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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

JANUARY TERM 1833.

BY RICHARD PETERS.

COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. VII.

Philadelphia:

DESILVER, JUN., AND THOMAS.

1833.

SUPREME COURT OF THE UNITED STATES.

Rule No. 39.

1. It is ordered by the court, that during the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same, (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same: and in case the same shall not be so returned, the party receiving the same, shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. It is ordered by the court, that during the session of the court, any judge thereof may take from the law library any book or books he may think proper, he being responsible for the due return thereof.

Rule No. 40.

Whereas, it has been represented to the court, that it would in many cases accommodate counsel, and save expense to parties, to submit causes upon printed arguments: it is therefore ordered that in all cases brought here on appeal, writ of error or otherwise, the court will receive printed arguments, if the counsel on either or both sides shall choose so to submit the same.

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The following Gentlemen were admitted to practice at the Bar of the Supreme Court of the United States at January Term 1833.

Robert T. Lytle,	Cincinnati, Ohio.
John R. Livingston, Jun.	New York.
Junius H. Hatch,	New York.
William M. Oliver,	New York
Justin Butterfield,	New York.
William S. Brent,	District of Columbia.
William S. Fulton,	Arkansas.
William Hogan,	New York.
Edward C. Reed,	New York.
S. S. Prentiss,	Mississippi.
Henry Rogers,	Pennsylvania.
Henry S. Handy,	Indiana.
Robert S. Finley,	Ohio.
William W. Handy,	Maryland.
Henry Cooper,	Indiana.
J. Dandridge,	Washington, D. C.
P. R. Fendall,	Washington, D. C.
W. P. Hallett,	New York.
Samuel Starkweather,	New York.
Henry M. Watts,	Pennsylvania.
Arthur Middleton, Jun.	South Carolina
Robert Burke,	Pennsylvania.
Isaac Leet,	Pennsylvania.
H. M. Western,	New York.
James M. Buchanan,	Maryland.
Matthias Morris,	Pennsylvania.
Daniel Le Roy,	Michigan.
John Marbury,	District of Columbia.

Thomas Douglass,	Florida.
James A. Stewart,	Maryland.
William C. Browne,	Pennsylvania.
John Adams Smith,	New York.
George S. Hawkins,	Florida.
Capman Johnson,	Virginia.
Alfred P. Walden,	New York.
Henry King,	Pennsylvania.
Isaac S. Reed,	Mississippi.
J. H. Daviess,	Kentucky.

THE DECISIONS

OF

THE SUPREME COURT OF THE UNITED STATES

AT

JANUARY TERM 1833.

THE UNITED STATES, PLAINTIFFS IN ERROR v. GEORGE MACDANIEL.

The United States instituted a suit to recover a balance charged on the books of the treasury department against the defendant, who was a clerk in the navy department, upon a fixed annual salary, and acted as agent for the payment of moneys due to the navy pensioners, the privateer pensioners, and for navy disbursements; for the payment of which, funds were placed in his hands by the government. He had received an annual compensation for his services in the payment of the navy pensioners; and for fifteen years, he had received, in preceding accounts, commissions of one per cent on the moneys paid by him for navy disbursements. He claimed these commissions at the treasury, and the claim had been there rejected by the accounting officers; and if allowed the same, he was not now indebted to the government. The United States, on the trial of the case in the circuit court, denied the right of the defendant to these commissions, as they had not been allowed to him by any department of the government, and asserted that the jury had not power to allow them on the trial.

The rejection of the claim to commissions by the treasury department, formed no objection to the admission of it as evidence of offset before the

jury. Had the claim never been presented to the department, it could not have been admitted as evidence by the court. But, as it had been made out in form and presented to the proper accounting officers, and had been rejected, the circuit court did right in submitting it to the jury; if the claim was considered as equitable.

This court will not sanction a limitation of the power of the circuit court, in cases of this kind, to the admission of evidence to the jury on a trial, only to such items of offset against the claims of the government as were strictly legal, and which the accounting officer of the treasury should have allowed. It is admitted that a claim which requires legislative sanction, is not a proper offset either before the treasury officers or the court. But there may be cases in which the services having been rendered, a compensation may be made within the discretion of the head of the department; and in such cases the court and jury will do, not what an auditor was authorized to do, but what the head of the department should have done, in sanctioning an equitable allowance.

The act of the 27th of March 1804, by which the president of the United States was authorized to attach to the navy yard at Washington a captain of the navy for the performance of certain duties, was correctly construed by the head of the navy department until 1829, allowing to the defendant commissions on the sums paid by him, as the special agent of the navy department in making the disbursements.

By an act passed 10th July 1832, congress authorized the appointment of a separate and permanent navy agent at Washington, and directed the performance of the duties "not only for the navy yard in the city of Washington, but for the navy department, under the direction of the secretary of the navy, in the payment of such accounts and claims as the secretary may direct." These duties would not have been so specially stated in this act, if they had been considered by congress as coming within the ordinary duties of an agent for the navy yard at Washington, under the act of 1804. But independent of this consideration, it is enough to know that the duties in question were discharged by the defendant, under the construction given to the law by the secretary of the navy.

It will not be contended that one secretary of a department has not the same power as another to give a construction to an act which relates to the business of his department.

A practical knowledge of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers; there are numberless things which must be done,

that can neither be anticipated nor defined; and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every part of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits; and no change of such usages can have a retrospective effect, but must be limited to the future.

Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions.

That the duties in question were discharged by the defendant during office hours, can form no objection to the compensation claimed. They were required of him by the head of the department; and being a subordinate, he had no discretion to decline the labour and responsibility thus imposed. But seeing that his responsibility would be greatly increased, and perhaps his labour, the secretary of the navy increases his compensation, as in justice he was bound to do.

This action of assumpsit has been brought by the government to recover from the defendant the exact sum which in equity it is admitted he is entitled to receive for valuable services rendered to the public in a subordinate capacity, under the express sanction of the head of the navy department. This sum of money happens to be in the hands of the defendant; and the question is, whether he shall, under the circumstances, be required to surrender it to the government, and then petition congress on the subject. A simple statement of the case would seem to render proper a very different course.

It would be a novel principle to refuse payment to the subordinates of a department, because their chief, under whose direction they had faithfully served the public, had given an erroneous construction to the law.

The secretary of the navy, in authorizing the defendant to make the disbursements on which the claim for compensation is founded, did not transcend those powers, which, under the circumstances of the case, he might well exercise.

ERROR to the circuit court of the United States for the county of Washington, in the district of Columbia.

This action was brought on the 14th of August 1829 in the circuit court by the United States, to recover from the defendant the sum of nine hundred and eighty-eight dollars and ninety-four cents, alleged to have been found due on a settlement of his accounts by the accounting officers of the treasury department.

The case was tried in May 1831, and a verdict and judgment rendered for the defendant; to reverse which judgment, the United States prosecuted this writ of error.

Before the verdict was given, the district attorney of the

United States filed the following bill of exceptions. After stating that the United States gave in evidence an account against the defendant, settled at the treasury, upon which they claimed from the defendant a balance of nine hundred and eighty-eight dollars and ninety-four cents, with interest from August 3d, 1829, the bill of exceptions proceeds:

"The defendant then examined a witness to prove that the said defendant was a clerk in the navy department, at an annual salary of fourteen hundred dollars, and while he was so acting, he was engaged and acted as the agent for the payment of the money due to the navy pensioners, the privateer pensioners, and acted also as a special agent for the navy disbursements; and the moneys which were applied to the use of those objects were placed in his hands by the government, to be disbursed by him. That he was allowed for his services in the payment of pensions, the annual sum of two hundred and fifty dollars. But he has no knowledge that any annual sum was ever allowed him for his services as a special agent for the navy disbursements. The witness stated that he was also a clerk in the navy department, and was in the habit of stating the defendant's accounts as special agent; and he knows that a commission of one per cent was always allowed him, to his knowledge, for ten or fifteen years past, until the settlement of the present account, upon his disbursements as special agent for the navy disbursements.

"The witness further stated that the services of this special agent, in these disbursements, were similar to those performed by other navy agents, such as the navy agent of Boston, &c. That they amounted, during the period that he acted as agent as aforesaid, to from fifty to one hundred thousand dollars a year; that the defendant gave no bond or security, to his knowledge, for the performance of these duties.

"The defendant then gave in evidence to the jury the certificate of B. W. Crowninshield, then secretary of the navy, of the 3d May 1817, and his account against the United States, allowed by Smith Thompson, then secretary of the navy.

"*Navy Department, May* 3, 1817.

"George Macdaniel, as agent of the navy pension fund, upon

all expenditures by him heretofore made, is entitled to the same commissions as have been allowed to other agents.

"B. W. CROWNINSHIELD,

"*Secretary of the Navy.*

"The navy pension fund to George Macdaniel:

"For compensation as clerk of the navy pension accounts, from the 1st of July to the 31st of December 1818 inclusive, at the rate of two hundred and fifty dollars per annum $125 00.

"Respectfully submitted,

"G. MACDANIEL.

"Upon which account are the following indorsements: 'To be allowed,

"'SMITH THOMPSON.

"'Received payment in account,

"'G. MACDANIEL.'

"The defendant set up against the claim made against him by the United States, in this case, a charge for a commission of one per cent, as special agent of the navy department, on the expenditure of eleven thousand seven hundred and eighty-nine dollars and twenty cents, amounting to one hundred and seventeen dollars and eighty-nine cents, and a like commission of six hundred and ninety-two dollars and thirty cents, upon the expenditure of sixty-nine thousand two hundred and twenty-nine dollars and ninety-two cents, which commissions had been disallowed by the navy department, and if now disallowed upon this trial, would leave the defendant indebted to the United States in the sum of eight hundred and ten dollars and nineteen cents, exclusive of the other items of claim made against him in this case.

"The witness who gave testimony for the defendant, proved that the services performed by the defendant, as special agent as aforesaid, were performed during office hours, and occupied from one-third to one-fourth of his time.

"The defendant further proved that witness had had occasion in the discharge of his duties in the fourth auditor's office, to examine the accounts of defendant, and reported the accounts in question; that the same commission was claimed by defendant in these accounts, as had been charged and allowed in all his previous accounts, so far as witness has examined them; that

the services had then been rendered, and the moneys disbursed, when the exception was taken; that witness knows that the accounts of public disbursements, including all these allowances of commissions upon disbursements, are annually submitted to congress, and inspected by a committee specially appointed for that purpose; that said committee attends at the different offices, where the books are open for their inspection; that the accounts embracing defendant's claims and allowances are regularly so submitted and inspected, and that no objection, as witness has ever heard, was taken by any committee, or any individual, to such allowances, until defendant's final account, after leaving office, was settled by the fourth auditor. Defendant promptly paid over all the moneys in his hands when the amount was adjusted, reserving only the sums claimed by him, which appear in the accounts exhibited; and if they are allowed him, he has no public money in his hands.

"Defendant further offered in evidence a report from the secretary of the treasury to congress, 1st March 1831. Doc. 126, H. R. 21st Cong. 2d Sess.

"Upon the evidence so given to the jury, the counsel for the United States prayed the court to instruct the jury, that if they should believe the same to be true, that still the defendant had no right, by law, to the commissions which he claims in this case, and that, as the sums so charged as aforesaid, as commissions, had never been allowed to him by any department of the government, it was not competent for the jury to allow them upon this trial.

"Which instruction the court refused to give; to which refusal the United States, by their attorney, excepted."

The account exhibited on the trial by the district attorney of the United States, by which the balance alleged to be due was shown, was as follows:

To balance due the United States per his account current, rendered on the 5th June 1829, -	$688 33
This sum disallowed, as per reconciling statement of his navy expenditure account herewith, -	228 14
Commission on sixty-nine thousand two hundred and twenty-nine dollars and ninety-two cents, paid over to the treasurer of the United States,	

at one per cent, as debited in his account as late special agent of the navy department, marked A. Recorded on the 5th June 1829. Not allowed, - - - - - - - -	692 30
Compensation as agent for paying pensions from the 1st of March to the 31st of May 1829. Not allowed, - - - - - - - -	62 50
Error in statement No. 141, (previous report) in payments of Fall's pension, - - -	6 00
	$1,677 29
By this sum deposited to the credit of the treasurer of the United States the 3d of August 1829,	688 33
Balance due the United States, by statement examined by comptroller, 12th of August 1829,	988 96

THOMAS H. GILLISS, *Act. 4th Aud.*

The case was argued by Mr Taney, attorney-general, for the United States; and by Mr Coxe and Mr Jones, for the defendant.

For the United States it was contended, that the defendant was not entitled to the commissions claimed by him and mentioned in the bill of exceptions.

The attorney-general stated that the question presented in the case was, whether the defendant was entitled to commissions on payments made by him for navy purposes.

The navy agents, although not established by any particular law, have been recognised in various acts of congress. Their duties are well known and ascertained. There are navy agents at each navy yard, and there are navy agents who are not permanent. There is also an agent at the navy department to settle accounts not properly belonging to other navy agents. Mr Macdaniel was employed as the permanent navy agent at Washington; and also as the special agent of the department.

A reference to the accounts in the record will show that he made payments for sloops of war, ship houses, and for the marine corps. In making these payments, he performed duties which properly belonged to permanent navy agents, and for

which they were entitled to be paid. The question then is, whether he is entitled to commissions on the disbursements of money, which properly belonged to the duties of other agents.

By the act of congress of 22d March 1804, 3 Laws U. S. 619, the commandant of the navy yard at Washington was required to perform all the duties which have been performed by the defendant in error.

This continued to be the law until July 10, 1832, when congress passed an act repealing the provision assigning the duties of navy agents to the commandant of the navy yard; and authorizing the appointment of a permanent navy agent. The act of 1809, 4 Laws U. S. 221, did not embrace the navy yard at Washington.

Capt. Tingey was for many years the commandant of that navy yard; but he did none of the duties assigned to him by the act of 1804: those duties were performed by the defendant. The case then was that of an officer of the United States, on whom duties were specially imposed, omitting to comply with them, and those duties executed by another person, who had no authority under any law to perform them. All the allowances, therefore, made to him for commissions on disbursements, as all his disbursements were such as ought to have been made by the commandant of the navy yard, were in violation of the act of 1804. These allowances have been made by a mistake of the law, and cannot be set off. Can the head of the navy department, by allowing payments not authorized by law, or by one not entrusted and directed by law to make them, authorize a compensation for them? This is denied.

The first question to be decided by the court is, what is the true construction of the act of 1804? The second is, how far the navy department can authorize the allowance of commissions, if they are not within the provisions of that act?

The language of the act of 1804 is such as to show clearly that all the payments to be made at the navy department, which were made by the defendant, were to be made by the commandant of the navy yard. For this purpose that office was created and the officer appointed.

When the law has fixed and established the duties of an officer, another person, or another officer, cannot be charged

with them. When duties are not defined, and when any one has an appointment in a department, the officer at the head of the department may enlarge the duties of the subordinate, and they must be executed. If these are extra duties, or new duties, it does not follow that any additional compensation is to be made. The decision of the head of the department is conclusive on this subject.

But the case before the court is not that of enlarging duties, or of calling for the performance of new ones, for which no officer has been appointed; it is that of giving duties to one, when another is the proper officer assigned by law to do them. The right to do this is denied. When the law is silent, the department may sanction an allowance, but when the law expressly provides for the service, no usages, no direction can be set up to control the law. It is precisely the same case in principle as if it had said the duties shall not be performed by any other.

It is admitted that if usage can sanction the allowance claimed by the defendant, it is sustained; but it is denied that usage is of any value when it is in direct violation of law. As to the suggestion, that if the allowances which have been made to the defendant in accounts finally settled at the treasury were made in violation of law, then the same should be reimbursed to the United States, the answer is, that the accounts, having been adjusted, are finally disposed of. The accounting officers of the treasury act judicially upon accounts submitted to them, and no claim can be made for the repayment of allowances made by them in accounts which have been finally disposed of by them.

Mr Coxe and Mr Jones, for the defendant in error.

They denied that by the act of 1804 the duties performed by the defendant were assigned to the commandant of the navy yard at Washington. He was by that act made the navy agent *at that navy yard*, but he was not authorized to make, nor did he ever make payments from the navy department. The words of the act are "agent of the department," not navy agent. The duties of navy agent are not defined, and must necessarily rest in a great degree on the discretion of the secre-

tary. Mr Macdaniel has for twelve years been the agent for these payments, and he has been so under the uniform construction of that law which is now contended for in his favour. If he was not a clerk in the navy department, the duties performed by him, for which the commissions are claimed, did not appertain to those of any other officer. The allowances made to him have appeared in accounts which have passed under the scrutiny of a committee of congress without exception, and they have been sanctioned by every secretary of the navy while he performed the duties for which they are claimed.

The account of the defendant does not show any expenditures at the navy yard of Washington. It shows miscellaneous disbursements in various parts of the United States, and this under the immediate directions of the secretary here, and done as a special agent, out of the ordinary duties of the local navy agents.

The long usage should settle the construction of the law if it was doubtful; and the objection to pay for services rendered under this long secured construction, is founded on no principles of justice. It was for the head of the department to ascertain what the law was; and his construction of it should prevail; most certainly in favour of services performed under his directions, and with the anticipation of a compensation for them, derived from the uninterrupted usages of the department.

Mr Justice M'Lean delivered the opinion of the Court.

A writ of error is prosecuted in this case, by the United States, to recover a judgment of the circuit court for the district of Columbia.

The action was brought by the government to recover from the defendant a balance charged against him, on the books of the treasury department, amounting to the sum of nine hundred and eighty-eight dollars ninety-four cents.

In his defence, the defendant proved that he was a clerk in the navy department, upon an annual salary of fourteen hundred dollars; and that he also acted as the agent for the payment of the moneys due to the navy pensioners, the privateer pensioners, and for the navy disbursements. That the moneys

applied to the use of these objects, were placed in his hands by the government. That he received the annual sum of two hundred and fifty dollars, for his services, in the payment of pensioners; but that for ten or fifteen years, he received one per cent on moneys paid by him for navy disbursements.

That these disbursements amounted to from the sum of fifty, to a hundred thousand dollars a year, and that no security was required from him. He claimed the usual allowance of one per cent, upon certain sums of money, disbursed by him, which had been rejected by the treasury officers, but which, if allowed, would show that he was not indebted to the government.

Upon this state of facts, the attorney for the United States prayed the court to instruct the jury, that if they should believe the same to be true, that still the defendant had no right by law to the commissions which he claims, as the sum charged had never been allowed to him by any department of the government; and that it was not in the power of the jury to allow the commissions on the trial. But the court refused to give the instructions, and a bill of exceptions was taken.

Two questions are made by the bill of exceptions, for the decision of this court.

1. Whether the defendant has a right to compensation for the services charged.

2. Whether, if such right existed, it should have been allowed on the trial, as the proper department had decided against it.

As to the second ground, it may be proper to remark, that the rejection of the claim of the defendant by the treasury department, formed no objection to the admission of it by the court, as evidence of offset to the jury. Had the claim never been presented to the department for allowance, it would not have been admitted as evidence by the court. But, as it had been made out in form, and presented to the proper accounting officer, and was rejected, the circuit court did right in submitting it to the jury; if the claim was considered to be equitable.

On the part of the government, it is contended that, in a case like the present, the court, in admitting evidence of offset against the claim of the government, is limited, not only to

such items as were exhibited to the auditor, but to such as were strictly legal, and which he should have allowed.

This limitation on the power of the court, cannot be sanctioned. It is admitted, that a claim which requires legislative sanction, is not a proper offset, either before the treasury officers or the court. But there may be cases, in which, the service having been rendered, a compensation may be made within the discretion of the head of the department; and in such cases, the court and jury will do, not what an auditor was authorized to do, but what the head of the department should have done, in sanctioning an equitable allowance.

It being clear, that the circuit court did not err, in allowing the offset of the defendant, if he had a right to compensation for the services rendered, the validity of this right will be the next point for inquiry.

On the part of the government, it is contended, that the head of a department may vary the duties of the clerks in his department, so as to give despatch and regularity to the general business of the office; but that by such changes, no clerk or other officer of the department, has a right to an increase of compensation. That it appears in the present case there was no increase of labour, as to time; as the services for which compensation is charged were rendered during office hours. And it is also insisted, that the duties discharged belonged to another officer of the government; and that it is not competent for any officer of the government, even the president himself, to take from one officer certain duties which the law has devolved upon him, and require another to discharge them.

By the act of 27th March 1804, the president was authorized to "attach to the navy yard at Washington city, and to frigates and other vessels, laid up in ordinary in the eastern branch, a captain of the navy, who shall have the general care and superintendence of the same, and shall perform the duties of agent to the navy department."

Under this law, the attorney-general contends it was the duty of the commandant at the navy yard to make the disbursements which were made by the defendant; and consequently, no compensation for such services can be allowed to the defendant.

Whatever may now be the construction of this act, as it regards the duties of the commandant, it appears he was not required to make the disbursements which were made by the defendant; and consequently they could not have been considered, at that time, as forming a part of the duties of commander of the navy yard.

By the act of the 10th July 1832, congress authorized the appointment of a separate and permanent agent at Washington, who shall be entitled "to the same compensation, and under the same responsibilities, and to be governed by the same laws and regulations which now are, or may hereafter be adopted for other navy agents;" and it is made his "duty to act as agent not only for the navy yard in the city of Washington, but for the navy department, under the direction of the secretary thereof, in the payment of such accounts and claims as the secretary may direct."

By this act, that part of the act of 1804 which required the commander of the navy yard at the city of Washington to act as agent, is repealed.

Until the defendant was removed from office, in 1829, he continued to discharge the duties as special agent for the navy disbursements. But after that period, it is stated that a new construction of the act of 1804 being given, those duties were required to be performed by the commander of the navy yard, who continued to discharge them until an agent was appointed under the act of the last session.

Until this time, the act of 1804 seems never to have been construed, by the head of the navy department, as providing for the special services performed by the defendant; and it would seem from the provision of the late act, which requires the agent to act, not only for the navy yard, but for the navy department, and to "pay such accounts and claims as the secretary may direct," that the former construction was correct; and the court are of this opinion. These duties would not have been so specially stated in the act of last session, if they had been considered by congress as coming within the ordinary duties of an agent for the navy yard. But, independent of this consideration, it is enough to know that the

duties in question were discharged by the defendant, under the construction given to the law by the secretary of the navy.

It will not be contended that one secretary has not the same power as another, to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule, than the one now under consideration.

The defendant having acted as agent for navy disbursements for a great number of years, under different secretaries, and having uniformly received one per cent, on the sums paid, as his compensation, he continues to discharge the duties and receive the compensation, until a new head of the department gives a different construction of the act of 1804, by which these duties are transferred to the commander of the navy yard. By this new construction, whether right or wrong, no injustice is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. But such compensation has been refused him.

It is insisted that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the government.

A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that

can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions.

That the duties in question were discharged by the defendant during office hours, can form no objection to the compensation claimed. They were required of him by the head of the department, and, being a subordinate, he had no discretion to decline the labour and responsibility thus imposed. But seeing that his responsibility would be greatly increased, and perhaps his labour, the secretary of the navy increases his compensation, as in justice he was bound to do.

In discharging the ordinary duties of clerk, the compensation of the defendant was fixed at fourteen hundred dollars; but when the duties of agent for navy disbursements were superadded to those of clerk, there is an adequate augmentation of pay given to him. Is there any thing unreasonable or unjust in this?

But it is said there was no law authorizing such an officer to be appointed.

That the duties performed by the defendant were necessary for the public service, has not been denied; nor is it pretended that the commissions allowed him, were higher than the amount paid for similar services elsewhere. The payments by him were legal, and being made under the immediate direction of the secretary of the navy, errors were avoided which might have occurred under other circumstances.

It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the navy and others who were engaged in the service of the department, certain disbursements became necessary; and as no law spe-

cially authorized the appointment of an agent for this purpose, they were required to be made by a clerk.

In this manner were these payments made for fifteen years, under different secretaries of the navy, and the same rate of compensation, as now claimed, was allowed. The charge was sanctioned by the accounting officers of the treasury department, and no objection was ever made to it by the committees of congress, who annually inspected the books of the department.

It would seem, therefore, whether the claim of the defendant be varied in reference to the services performed or to the long sanction which has been given to them by the navy and treasury departments, its justice is unquestionable. The government does not deny the performance of the services by the defendant, nor that they do in equity entitle him to compensation; but, as his appointment was without legal authority, it is insisted he can obtain compensation only by application to congress.

An action of assumpsit has been brought by the government to recover from the defendant the exact sum, which, in equity, it is admitted he is entitled to receive, for valuable services rendered to the public, in a subordinate capacity, under the express sanction of the head of the navy department. This sum of money happens to be in the hands of the defendant, and the question is whether he shall, under the circumstances, be required to surrender it to the government, and then petition congress on the subject.

A simple statement of the case would seem to render proper a very different course.

If some legal provision be necessary to sanction the payment of the compensation charged, application should be made to congress by the head of the department, who required the service and promised the compensation. But no such provision is necessary. For more than fifteen years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a department, because their chief, under whose direction they had faithfully served the public, had mistaken his own powers, and had given an

erroneous construction of the law. But the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the sum of money for the recovery of which this action was brought. They think that the secretary of the navy, in authorizing the defendant to make the disbursements, on which the claim for compensation is founded, did not transcend those powers which, under the circumstances of the case, he might well exercise. And they therefore think that the circuit court did not err in refusing to give the instructions to the jury as prayed by the attorney of the United States. The judgment of the circuit court is therefore affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

The United States, plaintiffs in error v. Eleazar W. Ripley.

The United States brought an action against general Ripley for a certain amount of public money he had, as was alleged, failed to account for and pay over as the law required. The defendant was in the service of the United States from 1812 to 1817; and was promoted at different periods, until he resigned his commission as major-general by brevet in the latter year. During this period he rendered distinguished and active military services to his country, and received the pay and emoluments to which his rank entitled him, under the law and regulations applicable thereto. Large sums of moneys passed through his hands, and were disbursed by him for the supplies of the troops under his command. He claimed a commission on these sums, and offered evidence to prove that similar allowances had been made to others. He also claimed extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans of fortifications, and for procuring and forwarding supplies of provisions, &c. to troops of the United States, beyond his military command. These claims were resisted by the United States on the ground that no other compensation could be allowed to him than such as was mentioned or defined by the laws of the United States, by instructions of the president, or by the legal regulations of the war department.

It is presumed that every person who has been engaged in the public service has received the compensation allowed by law, until the contrary appear. The amount of compensation in the military service may depend, in some degree, on the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances.

If the disbursements, for which compensation is claimed, were not such as were ordinarily attached to the duties of the officer, the fact should be stated; and also that the service was performed under the sanction of the government, or under such circumstances as rendered the extra labour and responsibility assumed in performing it necessary.

Should the accounting officer of the treasury refuse to allow an officer the established compensation which belongs to his station, the claim, having been rejected by the proper department, should, unquestionably, be allowed by way of set-off to the demand of the government by a court and jury.

And it is equally clear, that an equitable allowance should be made in the same manner for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of pecu-

liar emergency. In such a case the compensation should be graduated by the amount paid for like services under similar circumstances. Usage may be safely relied upon in such cases, as fixing a just compensation.

However valuable the plans for fortifications, prepared by a public officer, may have been, unless they were prepared at the request of the government, or were indispensable to the public service, as a matter of right, a compensation for them cannot be claimed.

The claims of compensation set up in this case, must be brought within the established rules on the subject, before they can receive judicial sanction.

ERROR from the district court of the eastern district of Louisiana.

In the district court of the United States for the eastern district of Louisiana, the United States, on the 7th of September 1822, instituted proceedings by two petitions, claiming in one, "the sum of thirteen thousand one hundred and sixty-three dollars, and ten cents, as due by Eleazar W. Ripley, late major-general in the army of the United States, which, on the 9th day of April 1821, at the treasury department, was found against him, on a statement and settlement of his account;" and claiming in the other, "the sum of four thousand one hundred and fifty-four dollars and ninety-five cents, which, on the 5th day of May 1821, at the treasury department, was found against him on the settlement and statement of his account."

To that petition the defendant pleaded that he was not indebted to the United States; and the case was afterwards, on the 28th of May 1830, submitted to a jury, and a verdict was found for the defendant in the following terms. "Verdict for the defendant as follows:

"Amount of his account, less $500 lost, -	$13,060 22
"Extra services at Washington, - -	2,000 00
	$15,060 22
"Deducting therefrom balance due the United States, - - - - - - - -	11,929 32
	$3,130 90

"A. CHARBONNET.

"*New Orleans, 29th of May* 1830."

Upon the verdict, the court ordered that the United States

take nothing by their petitions: and the United States prosecuted this writ of error.

On the trial of the cause, the district attorney of the United States took the following bills of exceptions.

"Be it remembered, that on this 28th day of May 1830, on the trial of this cause, the defendant offered the following testimony: The defendant entered in the army of the United States in the year 1812, as a lieutenant-colonel; was promoted at different periods until he attained the rank of major-general by brevet, which rank he held until the day of his resignation of his commission, in the year 1817. During this interval the defendant was engaged in active service, and received the pay and emoluments to which his rank entitled him, under the laws of the United States, and the regulations of the president of the United States, and of the department of war. Large sums of money passed through his hands, and were passed over by him to various officers in the army under his command, and to others who have been appointed by him to act as such, or were disbursed by him for the supplies of the troops by him commanded. He claimed to be allowed a commission on these disbursements, and offered evidence to prove that similar allowances had been made to other officers of the line of the army, who had been charged with the disbursements of public moneys; and also offered evidence to prove what would be a fair rate of compensation for such services. The defendant also claimed an allowance of extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans for fortifications, and for procuring and forwarding supplies of provisions, &c., to troops of the United States, beyond the limits of his military command, and offered testimony to prove the value of said services. To the introduction of all which testimony, the attorney for the United States objected, on the ground that no other or further compensation could be allowed for disbursements made, or extra services rendered, as aforesaid, than such as were sanctioned or defined by the laws of the United States, by instructions of the president of the United States, or by regulations of the war department, legally made. But the court overruled the objection and admitted the testimony."

"And be it further remembered, that on the trial of this cause, the testimony in the case having been closed, the attorney of the United States prayed the court to instruct the jury that no allowance in the form of commissions or otherwise, for moneys disbursed, as aforesaid, or extra compensation for services rendered under the circumstances hereinbefore stated, could be admitted as a legal and equitable set-off against the claims of the United States; other than such as were sanctioned and defined by the laws of the United States, by instructions of the president of the United States, or by regulations of the department of war, legally made. But the court refused so to instruct the jury, but stated to them that the defendant was entitled to credit for commissions on disbursements, and allowances for extra services, and that they must judge of the rate and extent of such commissions."

The case was argued, for the plaintiffs in error, by Mr Taney, attorney-general of the United States; no counsel appeared for the defendant in error.

For the United States, it was contended, that from the bill of exceptions and the verdict of the jury, it appeared that some of the services for which extra compensation was claimed were rendered by general Ripley in the line of his duty, and that it did not appear that others were so performed, but the government had the advantages of the services. The receiving and paying money for which commissions are claimed, were of the former description, and are not represented otherwise. Other charges are made on the allegation that they are for services out of, or beyond his duty.

The question to be decided by the court, depends upon the fourth section of the act of congress of 1794, 2 Laws U. S. 594.

By that law no claims can be made which could not be allowed by the accounting officers of the treasury in the settlement of accounts. It was not intended that claims which could not be presented to those officers, claims for services which were not, by the law regulating the duties of those who made the claims, authorized and designated, and for which the officers of the treasury could not admit a right to compensation.

should be submitted to a court and jury. The errors of the accounting officers, in their construction of the laws, could alone be brought before a court and jury. The term "justly," which is found in the fourth section of the act, was not intended to enlarge the powers of the court and jury beyond that given to the accounting officers.

It is admitted that if the credits or debits claimed against the government were of such a nature that they should have been allowed by the accounting officers, a court and jury have a right to judge of their amount or extent, but they must have been previously submitted at the treasury. There is no difference in the application of this rule to debtors and creditors of the United States.

The principle which is implied in these positions is, that the law never meant to invite resistance in courts of justice by those upon whom the government had claims, by referring the credits of which they could not avail themselves with the accounting officers of the treasury, to courts of law: a contrary deduction from the statute would require strong language to sustain it. To illustrate and maintain these views of the law, the third section of the act was referred to, and the case of the United States v. Wilkins, 6 Wheat. 144, was cited.

The only credits which can be claimed by an officer in the service of the United States, are those for services performed under the authority of a law, by a contract made by an officer or agent of the government, authorized to make the contract. Although services may have been rendered, and the government may be bound in equity and good conscience to allow a compensation for them, yet if the auditor of the treasury could not allow for them, courts and juries cannot look into them. This rule does not apply to the sum or amount, unless a specific sum is stated in the contract, and in such a case the amount stated is conclusive. It is not contended that any difference exists between implied contracts with the government, when a law has authorized a contract, and implied contracts with individuals. The authority to make the contract to bind the United States must be shown.

Upon these principles, it was the duty of the defendant in error to have shown the provisions of the law, or the regulations

of the war department authorized by law, under which the claims of set-off and debit were sanctioned. The bill of exceptions asserts that they were not authorized by any law or by any regulations of the department of war.

It is submitted to the court whether, where there is no law to authorize the claims; where the president, as the head of the government, has no authority by law to authorize such claims; and where there are no regulations of the war department to sanction them, a court of the United States could, on the ground of there being an equity in favour of the claims, allow them.

As to the words *equitable set-off* in the third section of the act, it was argued that it could not have been the intention of the legislature to authorize a set-off as a compensation for services for which the United States were not bound to pay. These terms intend that such set-off shall be admitted when the government was *justly* bound to pay the sums charged for the services, but for which the party making the claim could not sue the United States. They import the claims which the party, asserting the set-off, is justly entitled to; and which the accounting officers of the treasury are authorized by law to admit.

Mr Justice M'Lean delivered the opinion of the Court.

The United States have brought this writ of error, to reverse a judgment of the court of the United States for the eastern district of Louisiana.

An action was brought in that court to recover from the defendant a certain amount of public money, for which he had failed to account, and neglected to pay over as the law requires.

As the facts of the case appear in the following bill of exceptions, it will be unnecessary to advert, specially, to the pleadings in the cause.

"Be it remembered, that on this 28th May 1830, on the trial of this cause, the defendant offered the following testimony: That he entered into the army of the United States in the year 1812 as a lieutenant-colonel; was promoted at different periods until he attained the rank of major-general by brevet, which rank he held until the day of his resignation of his commission

in the year 1817. During this interval he was engaged in active service, and received the pay and emoluments to which his rank entitled him, under the laws of the United States, and the regulations of the president of the United States and of the department of war.

"Large sums of money passed through his hands to various officers in the army under his command, or were disbursed by him for the supplies of the troops by him commanded. He claimed to be allowed a commission on these disbursements, and offered evidence to prove that similar allowances had been made to other officers of the line of the army, who had been charged with the disbursements of public moneys; and also offered evidence to prove what would be a fair rate of compensation for such services.

"The defendant also claimed an allowance of extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans for fortifications, and for procuring and forwarding supplies of provisions, &c. to troops of the United States, beyond the limits of his military command, and offered testimony to prove the value of said services. To the introduction of all which testimony the attorney for the United States objected, on the ground that no other or further compensation could be allowed for disbursements made, or extra services rendered, as aforesaid, than such as were sanctioned or defined by the laws of the United States, by instructions of the president of the United States, or by regulations of the war department, legally made. But the court overruled the objection and admitted the testimony."

And the testimony being closed, the attorney of the United States prayed the court to instruct the jury, that no allowance in the form of commissions or otherwise, for moneys disbursed as aforesaid, or extra compensation for services rendered, under the circumstances before stated, could be admitted as a legal and equitable set-off against the claim of the United States, other than such as were sanctioned and defined by the laws of the United States, by instructions of the president, or by regulations of the department of war, legally made. But the court refused so to instruct the jury, and stated to them that the defend-

ant was entitled to credit for commissions on disbursements and allowances for extra services, and that they must judge of the rate and extent of such commissions and allowances.

The jury rendered a verdict against the United States, and reported a balance due from them to the defendant.

The claim set up by the defendant, and which was allowed by the jury, rested on two grounds.

1. For certain disbursements made by him.

2. For preparing plans for fortifications, and for procuring and forwarding supplies of provisions, &c. for the troops beyond his military command. The latter service is said, in the bill of exceptions, not to have been within the line of his duty; but no such statement is made in regard to the former.

In behalf of the United States it is contended, that the court can only allow credits which the auditor should have allowed; and that unliquidated damages cannot be set off at law.

In the case of the United States v. Macdaniel, which has been decided at the present term, this court has said, that the powers of the court and jury to admit credits against a demand of the government, were not limited to items which should have been allowed by the auditor. That in all cases where an equitable claim against the United States is set up by a defendant, which, under the circumstances, should have been allowed by an exercise of the discretionary powers of the president or the head of a department, it should be submitted to the jury, under the instructions of the court.

Equitable, as well as legal claims against the government, are contemplated by the law as proper items of credit on the trial; and so this court decided in the case of the United States v. Wilkins, reported in 6 Wheat. 135.

It is presumed that every person who has been engaged in the public service, has received the compensation allowed by law, until the contrary shall be made to appear. The amount of compensation in the military service may depend, in some degree, on the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances. So far then as it regards the pay of the defendant for services rendered in the line of his duty, it would seem not to be difficult for him to show certain regula-

tions of the war department, or instructions of the president, within the rule stated in the bill of exceptions by the attorney of the United States.

If, however, the disbursements made, for which compensation is claimed, were not such as were ordinarily attached to the duties of the office held by the defendant, the fact should have been so stated; and also that the service was performed under the sanction of the government, or under such circumstances as rendered the extra labour and responsibility assumed by the defendant in performing it necessary. Should the accounting officers of the treasury department refuse to allow an officer the established compensation which belongs to his station; the claim, having been rejected by the proper department, should unquestionably be allowed, by way of set-off, to a demand of the government, by a court and jury.

And it is equally clear, that an equitable allowance should be made, in the same manner, for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of peculiar emergency. In such a case, the compensation should be graduated by the amount paid for like services, under similar circumstances. Usage may safely be relied on in such cases, as fixing a just compensation.

The allowances claimed under the second head, for services which did not come within the range of his official duties, should have been shown by the defendant to have been performed with the sanction of the government, or under circumstances as above stated.

However valuable the plans for fortifications prepared by the defendant may have been, unless they were prepared at the request of the government, or were indispensable to the public service; he cannot claim a compensation for them, as a matter of right.

The distinguished services rendered by the defendant during the late war, are advantageously known to the country; but the claims set up in the case under consideration must be brought within the established rules on the subject, before they can receive judicial sanction. And as, in the opinion of

this court, the district court erred in their instructions to the jury, which were given without qualification, the judgment must be reversed, and the cause remanded for proceedings de novo.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the said district court erred in their instructions to the jury: whereupon it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said district court, with directions to award a venire facias de novo.

THE UNITED STATES, PLAINTIFFS IN ERROR V. THOMAS FILLEBROWN, JUN.

The United States instituted an action to recover a balance, certified at the treasury, against the defendant on the settlement of his accounts as secretary to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board. These claims were rejected by the accounting officers of the treasury, and were on the trial set up by way of set-off against the demand on the part of the United States. Held: that the allowance of compensation by a fixed salary to the defendant, as the secretary of the board of the navy hospital commissioners, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund.

Held: that it was not necessary to entitle the defendant to such compensation, that the board of commissioners should have passed a resolution for the payment of such commissions, and that the claim of commissions should have been sanctioned and settled by the board, in order to enable the defendant to set up a claim against the United States.

The authority of the commissioners to appoint a secretary was not denied; and this same authority must necessarily exist, to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them.

From the testimony in the case, it is very certain that the secretary of the navy considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation. And it is fairly to be collected from his deposition that all this received the direct sanction of all the commissioners. But whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law. It was therefore an express contract entered into between the board or its agent, and the defendant; and it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind the contract, and withhold from the defendant the stipulated compensation. There is no doubt, the board, composed of other members, had the same power over this matter as the former board; but it cannot be admitted that it had any greater power.

The rejection therefore of these claims, on the 7th of September 1829, after all the services had been performed by the defendant, can have no influence upon the question.

There is no general principle of law known to the court, and no authority has been shown establishing the doctrine that all the proceedings of such boards must be in writing, or that they shall be deemed void; unless the statute under which they act shall require their proceedings to be reduced to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing; but the law imposes no such indispensable duty. The act of 1811, 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury and war departments, a board of commissioners, by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed: but the mode and manner of transacting their business is not in any way prescribed.

It is not true even with respect to corporations, that all their acts must be established by positive record evidence. In the case of the Bank of the United States v. Dandridge, 12 Wheat. 69, this court say, "we do not admit as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it, makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction, it must be obeyed. If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same. This principle is fully established in the case of the United States v. Wilkins, 6 Wheat. 143: which brought under the consideration of the court, the act of the 3d of March 1797, 2 Laws U. S. 594, providing for the settlement of accounts between the United States and public receivers.

The instructions given to the jury by the circuit court were: if the jury believe from the evidence, that the regular duties to be performed by the defendant, as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund: that the duty of receiving and disbursing the fund was required of and performed by him, as an extra service, over and above the regular duties of his said appointment: that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive stated salaries or other fixed compensation, commissions, over and above such salaries or other compensation, upon the receipts and disbursements of public moneys, appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labour and responsibility, apart from such ordinary and regular duties: and that the defendant took upon himself the labour and responsibility of such re-

ceipts and expenditures of the navy hospital fund, at the request of said commissioners, or with an understanding on both sides, that he should be compensated for the same, as extra service, by the allowance of a commission on the amount of such receipts and expenditures: then it is competent for the jury in this case, to allow such commission to the defendant, on the said receipts and disbursements, as the jury may find to have been agreed upon between the said commissioners and the defendant: or, in the absence of any specific agreement, fixing the rate of commissions at such rate as the jury shall find to be reasonable and conformable to the general usage of the government, and its departments; in the like cases. These instructions were entirely correct, and in conformity to the rules and principles of the law on this subject.

Upon the trial of this cause, the defendant offered to prove, by parol testimony, the general usage of the different departments of the government, in allowing commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage, but the court permitted the evidence to be given. By the court: we see no grounds for objection against the usage offered to be proved, and the purpose for which it was so offered, as connected with the very terms upon which the defendant was employed to perform the services. It was not for the purpose of establishing the right, but to show the measure of compensation, and the manner in which it was to be paid.

IN error to the circuit court of the United States for the district of Columbia, holden in and for the county of Washington.

The United States, on the 23d day of May 1829, instituted a suit in the circuit court of the district of Columbia, for the recovery of the sum of two thousand and seven dollars and eighty-four cents, to which amount the declaration alleged the defendant in error, Thomas Fillebrown, Jun., to be indebted to the United States, "for sundry matters and articles properly chargeable in account, as stated in a particular account, &c." The declaration also contained the common counts of goods sold and delivered, money laid out and expended, money had and received, and an account stated and settled, &c. The defendant pleaded non assumpsit, &c.

The cause was tried by a jury at May term 1830, and a verdict was given in favour of the United States, for one thousand nine hundred and thirty-seven dollars and seventy cents; which verdict was, on the motion of the counsel for the defendant, set aside, and a new trial ordered.

On the first Monday of May 1831, the cause was again tried by a jury, and the following verdict was rendered in favour of the defendant, upon which the court entered judgment.

"And the jurors aforesaid, at the time of bringing in their verdict aforesaid, filed in court here the following certificate, to wit: 'The jurors empannelled in the case of the United States v. Thomas Fillebrown, Jun., find, upon examining the accounts filed, that the United States are indebted to the said Fillebrown in the sum of four hundred and thirty dollars.

"'Witness our hands, this 26th day of May 1831.'"

From this judgment the United States prosecuted a writ of error.

On the trial of the case, the deposition of Samuel L. Southard, Esq., late secretary of the navy of the United States, was read in evidence on the part of the defendant.

In the testimony of Mr Southard it was stated, that from the year 1825 to March 1829, he, Mr Southard, was secretary of the navy, and one of the commissioners of "the navy hospital fund." The situation of this fund was such as to require constant and earnest attention. Thomas Fillebrown, Jun., the defendant, was, by the board, appointed its secretary for the discharge of those duties, and his salary was fixed at two hundred and fifty dollars per annum.

Mr Southard was, by the direction of the board, and by previous practice and usage, acting commissioner of the fund, and attended to all matters connected with it, except in cases of new arrangements; the expenditure of money on a new object; or the settlement of a new principle: when the whole board was consulted, and his acts authorized or sanctioned by it. Mr Fillebrown's appointment had the direct and express sanction of the board; and it was understood that he was to discharge his duties at such times, and in such manner, as not to interfere with his duties as a clerk in the navy department; which situation he held at the time of his appointment, and continued to hold.

His appointment was in October or November 1825, but the records of the fund do not show the whole amount of labour which he had to perform; his duties were often both troublesome and laborious.

Some time after his appointment, it was considered proper to procure necessary books, and to make retrospective examinations into records and accounts in certain public offices, and to do whatever should be required to put the fund in a proper condition. This was regularly the duty of the secretary of the fund; but as it related to a period anterior to his appointment, for which he could not receive a compensation in his salary as secretary, it was thought proper to allow him a salary for such period previous to his actual appointment, as would be proportionate to the additional labour actually performed by him; and such allowance was made about May 1826, and had the approbation of the board. The allowance was regarded in the light of extra service, and was given in this form to show the character of the service rendered by the defendant in error. Subsequent to the appointment of the defendant, the navy hospital fund became sufficient for the purchase of sites for hospitals, and to commence the erection of buildings. The money collected was placed in the hands of the treasurer of the United States, as the treasurer of the fund; and a special agent who should attend carefully to collecting and disbursing it was found indispensable. This did not belong to the duties of the secretary of the board; but it was thought best to give the agency to him on account of his knowledge of the interests connected with the fund, and his fitness for it.

The manner and the forms of transacting the business were arranged with the defendant by Mr Southard, as the acting commissioner; the responsibility attending the payment and transmission of money was imposed upon the defendant: and at all times he acted uprightly, diligently and skilfully in every thing relating to the subject.

In so doing, it was the understanding of the commissioners that he should receive compensation in the mode and according to the practice of the government in other and similar cases: but Mr Southard said he did not distinctly recollect whether it was to be by a specific sum, or by a per centage on the money disbursed, but was under the impression that it was the latter, that being the usual mode in such cases.

He was under the impression that he did, by the authority of the board, allow one or more of the accounts presented by

Mr Fillebrown, in conformity with the facts and principles stated; and that such approval and allowance will be found on file in the office of the secretary of the fund. He very well recollected, that about the 1st of March 1829, Mr Fillebrown called on him with his accounts, desiring their adjustment and allowance; he was then very sick and not able to examine them, or consult the other commissioners; he therefore dictated to an amanuensis, a letter to Mr Fillebrown, expressing his views and opinions respecting his claims, which letter is probably dated on the 2d of March 1829, and now on file among the papers of the fund; he then believed, and still believes, that Mr Fillebrown was entitled to a just compensation for the performance of the duties before mentioned.

The appointment of Mr Fillebrown as secretary of the commissioners of naval hospitals, was entered on the minutes of the board at a meeting of the commissioners of naval hospitals, in the city of Washington, on the 7th day of November 1825.

"Present, Hon. Samuel L. Southard, secretary of the navy; Hon. Richard Rush, secretary of the treasury; Hon. James Barbour, secretary of war.

"It was resolved, that a secretary be appointed to this board, to take charge of the books, papers, &c. belonging to the hospital fund;-and to execute such duties relative thereto, as may be required of him by the board; for which services he shall be allowed the sum of two hundred and fifty dollars per annum.

"Resolved, that Mr Thomas Fillebrown, Jun. be appointed secretary.

"And then the board adjourned."

Of this appointment he was informed on the same day.

"NAVY DEPARTMENT, *7th November* 1825.

"Mr THOMAS FILLEBROWN, Jun., Present:

"Sir:—You are hereby appointed secretary to the board of commissioners of the naval hospital fund. The duties appertaining to this appointment you will commence forthwith. Your compensation will be two hundred and fifty dollars per annum.

"I am, respectfully, &c.

"SAMUEL L. SOUTHARD."

The retrospective duties referred to in the deposition of Mr

Southard, were authorized, and a compensation for the same allowed by the following letter:

"NAVY DEPARTMENT, *22d May* 1822.

"Mr THOMAS FILLEBROWN, Present:

"Sir:—In consideration of the duties performed by you since your appointment as secretary to the commissioners of navy hospitals, you may consider your appointment as ante-dated six months, and draw a warrant for your salary for that period.

"I am, respectfully, &c.

"SAMUEL L. SOUTHARD."

The following letter was also read in evidence.

"NAVY DEPARTMENT, *2d March* 1829.

"Sir:—It was my intention before I left the department, to have submitted to the consideration of the other commissioners of the navy hospital fund, your claim and account for compensation for attending to the disbursement of the moneys of the fund, which have passed through your hands since your appointment as secretary. I consider the claim perfectly just, and do not doubt but a fit compensation would have been made, could the question have been submitted to the board. Neither the responsibility nor the labour is embraced within your duties as secretary, and if any other person had been appointed to perform them, an allowance must necessarily have been made to him.

"I do not doubt when the commissioners shall understand the merits of the claim, that no hesitation will be felt on the subject.

"Nothing but my severe and protracted indisposition during the whole winter, has heretofore prevented its adjustment.

"I am, respectfully, &c.

"SAMUEL L. SOUTHARD.

"THOMAS FILLEBROWN, Esq.

"*Sec. Nav. Hos. Fund, Washington.*"

Other evidence was introduced for the purpose of showing that the allowances of commissions had been made by the government to others, upon similar principles with those on which the defendant rested his claims.

This evidence was furnished by accounts settled at the office of the third auditor of the treasury, with officers of the army

of the United States, employed in the years 1822, 1823, 1824 and 1825, in which allowances of commissions, &c. were made, and compensation paid for extra services. Twenty-seven accounts were exhibited containing these allowances. Part of the testimony was extracted from a report of the fourth auditor made to the house of representatives at the second session of the nineteenth congress. H. R. Documents, 41.

Parol evidence of a usage in the public departments to admit and pay such charges by the officers and agents of the government, was also given. The accounts of the defendant, as settled by the accounting officers of the treasury, were also given in evidence.

The plaintiffs in error took two bills of exceptions to the decisions of the circuit court on the trial of the cause.

The first bill of exceptions, after setting forth the evidence given on the trial, states,

"Upon the evidence so given, the counsel for the United States prayed the court to instruct the jury—

"That if, from the evidence aforesaid, it should appear to them that the defendant had accepted the appointment of secretary of the board of navy hospital commissioners, upon the terms mentioned in the said appointment, and in the said letter of S. L. Southard to him, of the 7th of November 1825, as herein before stated; that in that case, he was not entitled to any extra compensation for the disbursement of the moneys belonging to the said navy hospital fund; and that he was only entitled to two hundred and fifty dollars a year, for the whole of the services performed by him for the said board.

"And the said plaintiffs prayed the court further to instruct the jury—

"That, if they should be satisfied by the evidence aforesaid, that the said board of navy commissioners had never passed any order or resolution for the payment of any commission upon the moneys disbursed by the defendant for the said board, and that the claim for commissions, which he now makes, had never been sanctioned or settled by the said board; that it is not competent for him now to set up the said claim for commissions against the claim of the United States, for which this suit is brought.

"Which instructions the court refused: and thereupon, at the instance of the defendant, instructed the jury as follows:

"If the jury believe, from the evidence, that the regular duties to be performed by the defendant, as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund; that the duty of receiving and disbursing the fund was required of and performed by him, as an extra service over and above the regular duties of his said appointment; that it has been for many years the general practice of the government and its several departments, to allow to persons, though holding offices or clerkships, for the proper duties of which they received stated salaries or other fixed compensation, commissions over and above such salaries or other compensation, upon the receipts and disbursements of public moneys, appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labour and responsibility apart from such ordinary and regular duties; and that defendant took upon himself the labour and responsibility of such receipts and expenditures of the navy hospital fund, at the request of said commissioners, either under an agreement, or with an understanding on both sides, that he should be compensated for the same, as extra service, by the allowance of a commission on the amount of such receipts and disbursements; then it is competent for the jury, in this case, to allow such commissions to the defendant, on the said receipts and disbursements, as the jury may find to have been agreed upon between the said commissioners and defendant; or, in the absence of any specific agreement fixing the rate of such commissions, such rate as the jury shall find to be reasonable, and conformable to the general usage of the government and its departments in the like cases.

"To which refusal of the court to give the instructions moved by the plaintiffs, and to the said instructions given at the instance of the defendant, plaintiffs except."

The second bill of exceptions was as follows:

"Upon the trial of this cause, the defendant offered to prove,

by the testimony contained in the preceding bill of exceptions, the general usage of the different departments of the government, in allowing commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage. But the court permitted the evidence to be given, and the same was given accordingly. To which opinion and admission of the court, the plaintiffs by their counsel except, and this their bill of exceptions is signed, sealed, and ordered to be enrolled this 26th of May 1831."

The case was argued by Mr Taney, attorney-general, for the United States; and by Mr Coxe and Mr Jones, for the defendant.

For the United States it was contended:

1. That the defendant is not entitled to an allowance for salary as secretary for the time claimed in his account anterior to his appointment in November 7, 1825.

2. That he was not entitled to a credit for the commissions on disbursements mentioned in the exceptions.

3. That the usage and practice of the officers of the executive departments of the government to make such allowances, is not admissible in evidence for the purpose of proving their legal right to make them in this case.

The attorney-general referred to the acts of congress of March 2, 1799, 3 Laws U. S. 266, and of 26th of February 1811, 4 Laws U. S. 338, relative to the navy hospital fund, and the appointment of the commissioners of the same.

The evidence in the case contains the letter of Mr Southard relative to the appointment of the defendant as secretary to the board of commissioners of the navy hospital fund. The appointment was made on the 7th November 1825, and the compensation fixed at two hundred and fifty dollars per annum; and on the 22d May 1826 Mr Southard agreed to ante-date his salary six months.

On the 27th September 1829, J. H. Eaton, the secretary of war, and John Branch, the secretary of the navy, acting as a

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On the 27th September 1829, J. H. Eaton, the secretary of war, and John Branch, the secretary of the navy, acting as a

board of commissioners of the navy hospital fund, made the following order, which was filed in the office of the fourth auditor of the treasury:

"Mr Fillebrown, it appears, was appointed secretary in November 7, 1825. He can be entitled to pay, as such, only from the date of his appointment. The allowance of one per cent on the moneys disbursed, cannot be allowed, unless authorized by some existing law; none such is known to the commissioners; of course they cannot have authority to admit it.

"J. H. EATON.
"JOHN BRANCH.

"*September* 7, 1829."

The duties of the secretary of the board were not defined: they were, to do whatever the board should require from him. But it is not contended that the defendant's receiving a salary will preclude his receiving extra compensation for extra services. The question must turn upon the inquiry whether disbursements of the hospital fund were extra services?

From the nature of the services, they were necessarily a part of the duties of the secretary of the board; and the practice of allowing commissions on the payment of money under similar circumstances is not proved by the testimony to have been uniform or frequent.

The allowance for extra salary before the appointment of the defendant, could not be made by the secretary of the navy alone. It required the approbation of the board. The defendant had, therefore, no legal right to this allowance; and it should have been refused by the jury, under proper instructions from the court.

To give the proceedings of the board a legal and binding effect, they should have been in writing. Unless thus shown, the acts of the board cannot be proved. The assertion of Mr Southard, that the board approved of the allowance for the extra services in arranging and examining the accounts which existed before his appointment, is not sufficient to establish the right of the defendant to the same. It is doubtful, whether the proceedings of the board could be proved by parol, but this is not the question before the court; it is whether such parol order could overrule what a former board had done in writing.

It is also suggested, that the proceedings of the board in 1829, by which the extra allowance was rejected, may control the same. This was the act of the board, and it is immaterial whether it was composed of the same or of different individuals.

As to the commissions claimed on the disbursement of the money of the fund, it was argued by the attorney-general, that all public agents, unless in certain specified cases, must be appointed by the president. This is the provision of the act of March 3, 1809. 4 Laws, U. S. 220. Disbursements of the navy hospital fund come within the principles which regulate disbursements for the use of the navy; and if the act of 1809 applies to these disbursements, the commissioners could not appoint a disbursing officer.

No evidence of usage was admissible. If there was no law on the subject, no usage could sustain the practice. But if it was customary for a different description of officers to receive extra compensation, or commissions; no such custom could apply to a new office. The usage of the officers in the departments cannot make a law which shall bind the government. Usage, as connected with a particular office, may be evidence of an implied contract. But that cannot apply to newly created officers.

In reply to the argument for the defendant in error, the attorney-general admitted that the commissioners might appoint and employ agents to execute the duties attending the operations they were authorized to have conducted and executed; but such agents, he considered, must be appointed by the board. If a contract is made by an officer, it must be made under the authority of some law; and by the law, all authority was given to the board.

The defendant might have been employed to perform extra services for the board of commissioners; and he was not disqualified by reason of his being the secretary. But who had the power to authorize these services.

It is not pretended that the government is not bound by implied contracts, when services have been performed at the request of the government. But the agent who can thus bind it, must have authority to make the contract, or employ the person to perform the service out of which the implied contract arises.

A debt which can be set off against a claim by the government, must be one growing out of some contract or employment authorized by law: but it is denied that, under the act of 1797, all equitable demands against the government may be set off in a court of justice.

The acts of Mr Southard cannot be considered as the acts of the board; nor can those acts be proved by parol evidence, in opposition to the written proceedings of the board. All he did, must be considered subject to a ratification by the board; and void, unless so ratified. In this case, his acts were disaffirmed by the board in 1829, when the board acted in reference to them.

Nor could the board settle the defendant's accounts; they must be settled by the accounting officers of the treasury, in the ordinary way of settling accounts. The account of the defendant having been settled at the treasury, and his claims to the extra salary and for commissions disallowed there, the practice and understanding at the treasury, is shown to be adverse to such claims.

Mr Coxe and Mr Jones, for the defendant in error.

The allowance of a compensation for attention to the accounts of the navy hospital fund, and what was included in the duties assigned by the letter of Mr Southard, of the 22d May 1826, was in conformity with the frequent usages of the government. This was fully proved by the evidence. This principle has also had the ratification of the legislature. The usual duties of secretary could only have been prospective, and it was extra services to bring up the arrears of the board.

By an act of congress, of the 3d of March 1831, two thousand dollars were allowed to the clerk of the supreme court, for bringing up the minutes of the court, and for services which should have been performed by his predecessor. So the defendant in error was not bound as the secretary of the board to bring up old records of the proceedings of the commissioners, and to examine accounts which existed before his appointment.

The commissioners had authority to appoint a secretary under the third section of the act of 1811. The powers given to the board by that section, necessarily imply a power to appoint

agents, and to do what the trusts they had to perform required. They could not attend in person to the business and operations which the application of the funds under their charge enjoined upon the board. These operations were carried on in different parts of the United States.

The testimony and the correspondence of Mr Southard, show that a contract was made by him with the defendant; that an allowance was specified for the duties he was engaged in, which had the approbation of the board. The allowance presupposes the right to claim it. This was proved by competent evidence, as the board did not keep regular records of its proceedings, and no objection was made on the trial to the parol evidence; so that it is now free from all exceptions.

Nor can the rejection, in 1829, of the allowance of the salary under the letter of the 22d of May 1826, by the successors of those who made it, be of any value. The contract was made with full authority to make it; the duties which were the subject of the compensation, had been performed; and those who thus claimed the right to refuse or withhold the same, had no authority to do so.

As to the instructions given by the circuit court on the second prayer of the plaintiffs in error, it was argued that they were in conformity to the law, upon the evidence of the usage of the government in its different departments. This general construction of the acts of congress, and these harmonious views of the rights of those who performed extra services, should have due consideration.

There is no validity in the objection that such claims as those of Mr Fillebrown cannot be made the subject of set-off. All equitable claims, which have been properly exhibited in the first instance to the accounting officers, may be set up against the demands of the United States. The nature of the objection of the government to those who have been employed by them, entitles them to be so regarded. Pothier on Obligations, 1.

The powers given to the comptroller of the treasury in relation to the settlement of accounts by the act of congress of 1795, 2 Laws U. S. 502, making him the final judge upon claims presented to him, were, by the act of 1797, 2 Laws U.

S. 594, transferred to the courts; with the limitation that those claims must be first presented to the accounting officers of the treasury. Under the provisions of this act, all equitable as well as legal claims, founded on contract or the usage of the departments, may be brought forward before the court, and submitted under its direction to a jury. The government, by this act, places itself in the situation of an individual. The claims of the defendant are admitted, by the attorney-general, to be equitable.

The allowances of commissions are not forbidden by any statute; and the rules of the navy department admit them. Navy Rules, 17.

Cited, 3 Wheat. 173, to show the force of rules. Upon the principles contended for, cited, 6 Wheat. 135, 142; 1 Mason, 21; 12 Wheat. 559.

The case of the United States v. Watkins, 6 Wheat. 135, shows that any legal or equitable claim may be set off: and it is immaterial whether the claim of Mr Fillebrown had or had not been sanctioned by the board. The question is much broader. Did the board require or employ him to perform the services, and was he entitled to any and what compensation for it? His duty as secretary did not at all embrace the disbursement of the money of the fund. This was a duty of great responsibility, and this, as well as bringing up the arrears of records, was extra service.

Mr Justice THOMPSON delivered the opinion of the Court.

This case comes before the court on a writ of error to the circuit court of the district of Columbia. The action was brought to recover a balance certified at the treasury against the defendant, on the settlement of his accounts as secretary of the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board antecedent to his appointment as secretary, and also for commissions on the disbursements of moneys under the orders of the board. These claims had been rejected by the accounting officers of the treasury, and were now set up by way of set-off against the demand on the part

of the United States; and the questions before the circuit court were, whether the defendant was entitled to the compensation he claimed.

Upon the trial, after the testimony was closed, the counsel for the United States prayed the court to instruct the jury as follows:

1. That if, from the evidence aforesaid, it should appear to them that the defendant had accepted the appointment of secretary of the board of navy hospital commissioners upon the terms mentioned in the said appointment, and in the letter of Samuel L. Southard to him, of the 7th of November 1825, as hereinbefore stated; that in that case he was not entitled to any extra compensation for the disbursement of the moneys belonging to the said navy hospital fund; and that he was only entitled to two hundred and fifty dollars a year, for the whole of the services performed by him for the said board.

2. That if they should be satisfied, by the evidence aforesaid, that the said board of commissioners had never passed any order or resolution for the payment of any commission, upon the moneys disbursed by the defendant for the said board; and that the claim for commissions which he now makes, had never been sanctioned or settled by the said board; that it is not competent for him now to set up the said claim for commissions against the claim of the United States, for which this suit is brought.

Which instructions the court refused to give: but at the instance of the defendant's counsel gave other instructions which will be hereafter noticed.

The jury found a verdict for the defendant, and certified a balance in his favour, against the United States, for four hundred and thirty dollars; and the case comes here on a bill of exceptions.

Whether the first instruction asked on the part of the United States ought to have been given, must depend upon the defendant's appointment as secretary, and the extent of his duties under that appointment. The court was requested to instruct the jury, that if the defendant had accepted the appointment on the terms mentioned, he was entitled to no compensation

beyond his salary of two hundred and fifty dollars, for any services performed by him for the board.

The second instruction asked, involves the inquiry whether some order or resolution of the board for the payment of the commissions was not indispensably necessary to entitle the defendant to the allowance claimed by him.

The defendant was appointed secretary, at a regular meeting of the board, on the 7th of November 1825; and so far as his duties are defined, they are to be collected from the following resolution:

"Resolved, that a secretary be appointed to this board, to take charge of the books, papers, &c. belonging to the hospital fund, and to execute such duties relative thereto, *as may be required of him by the board*, for which services he shall be allowed the sum of two hundred and fifty dollars per annum."

The authority of the commissioners to appoint a secretary has not been denied; and this same authority must necessarily exist to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them.

It is admitted, on the part of the United States, that the defendant's being secretary of the board, forms no objection to his performing other services not included in his duty as secretary, and receiving a compensation therefor in the same manner as any other person might.

The terms on which the defendant accepted the appointment of secretary, being to execute such duties, relative thereto, as should be required of him by the board; it becomes proper to examine how the board considered the appointment, and what duties were required of him as secretary.

It is proper here to inquire, how the secretary of the navy, as one of the commissioners, stood in relation to the other members of the board.

It is evident from the manner in which this fund was created, and the purposes and objects to which it was applied, that the general and active superintendence over it belonged appropri-

ately to the secretary of the navy. It was therefore almost matter of course that the board should commit to him the principal management of the business, and consider him the agent of the board for that purpose. In addition to this, he was actually constituted such agent by the board.

Mr Southard, in his deposition, states that he was, *by the direction of the board*, and by the previous practice and usage, acting commissioner of the fund, and attended to all matters connected with it. But, when any new arrangements were to be made, or money to be expended on a new object, he consulted with, and had the approval and authority of the whole board. And all his acts were considered as authorized and sanctioned by the board.

With respect to the one hundred and twenty-five dollars claimed for six months salary, Mr Southard is very explicit. This allowance, he says, was made for *extra services*, and related to a time previous to his appointment; and that the allowance had the approbation of the board. This was a service not required or considered by the board as coming within his duty as secretary under his appointment, and a stipulated compensation agreed to be paid him therefor. It is not perceived what possible objection can exist against his being allowed this stipulated sum. Whether or not it was more than a just compensation for his services, is a matter which this court cannot inquire into. Indeed, that has not been pretended, if he is entitled to any thing beyond his salary of two hundred and fifty dollars.

With respect to the commissions, Mr Southard says, that, subsequent to the appointment of the defendant as secretary, the commissioners were enabled by appropriations, and collecting money belonging to the fund from various sources, to proceed to apply the funds to the establishment of navy hospitals as required by the act of congress. That these funds were placed in the hands of the treasurer of the United States, as the treasurer of the commissioners; and that in collecting and disbursing the fund, it was found indispensable to have an agent who should attend carefully to it, and be responsible to the board. *That this did not belong to the duties of the secretary.* But that it was thought best to give the agency to him on

account of his acquaintance with every part of the interest of the fund, and his fitness to discharge the duty. That he was appointed the agent with the understanding that he should receive a suitable compensation for the services he should render in *that capacity*. That it was the understanding of the commissioners that he should receive compensation in the mode, and according to the practice of the government in other similar cases. That he is under the impression that this was to be by a per centage on the money disbursed; and that he is also under the impression that he did, by the *authority of the board*, allow one or more of the accounts presented by the defendant in conformity to the facts and principles he has detailed.

From this testimony it is very certain that Mr Southard considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation. And it is fairly to be collected from this deposition, that all this received the direct sanction of all the commissioners. But, whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law. It was, therefore, an express contract entered into between the board or its agent, and the defendant; and it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind the contract, and withhold from the defendant the stipulated compensation. There is no doubt the board composed of other members, had the same power over this matter as the former board. But it cannot be admitted that it had any greater power. The rejection, therefore, of these claims on the 7th of September 1829, after all the services had been performed by the defendant, can have no influence upon the question.

It has been argued, on the part of the United States, that the sanction of the secretary of the navy, as one of the commissioners, can give no right to the allowance without the concurrence of the other members. This proposition is not denied: but the testimony of Mr Southard, as has been already shown, goes fully to establish the fact, that he had the general autho-

rity of the board to act as its agent; and leaves little or no doubt of the sanction of the board to the particular claims in question. It was, however, pretty strongly intimated at the bar, though it was not understood to be positively asserted, that these facts could not be established by parol, but that the proceedings of the board must be shown in writing. And this would seem to be one of the questions intended to be made under the second prayer. It would be a sufficient answer to this, that no objection was made at the trial to the admission of the evidence. But the objection, if it had been made, could not have been sustained. There is no general principle of law known to the court, and no authority has been shown establishing the doctrine, that all the proceedings of such boards must be in writing, or that they shall be deemed void, unless the statute under which they act shall require their proceedings to be rendered to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing. But the law imposes no such indispensable duty. The act of 1811, 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury and war departments, a board of commissioners by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed; but the mode and manner of transacting their business is not in any respect prescribed. It is not true even with respect to corporations, that all their acts must be established by positive record evidence. In the case of the Bank of the United States v. Dandridge, 12 Wheat. 69, this court says, "we do not admit as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction it must be obeyed." Considering then the testimony of Mr Southard as competent evidence to establish the acts of the board, it shows very clearly, that the services rendered by the defendant, and for which he claims compensation, were not embraced within his duties as secretary of the board; but were extra services, for which the commissioners agreed to make him compensation.

Another question may perhaps arise under the latter branch of the second prayer, whether the sanction or approval by the board of commissioners was an indispensable preliminary step to entitle the defendant to set up in the present action his claim against the demand of the United States. And we think it was not. If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same.

This principle is fully established in the case of the United States v. Wilkins, 6 Wheat. 143; which brought under the consideration of the court the act of the 3d of March 1797, 2 Laws U. S. 594, providing for the settlement of accounts between the United States and public receivers. And the court says, "there being no limitation as to the nature and origin of the claims for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States," subject, of course, to the requirement of the act, that the claim must have been presented to the proper accounting officers and disallowed.

The circuit court, therefore, properly refused to give the instructions asked on the part of the United States.

The instructions given to the jury are as follows:

If the jury believe from the evidence, that the regular duties to be performed by the defendant as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund; that the duty of receiving and disbursing the fund was required of, and performed by him as an extra service, over and above the regular duties of his said appointment; that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive stated salaries or other fixed

compensation, commissions over and above such salaries or other compensation, upon the receipts and disbursements of public moneys appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labour and responsibility, apart from such ordinary and regular duties: and that the defendant took upon himself the labour and responsibility of such receipts and expenditures of the navy hospital fund at the request of said commissioners, or with an understanding on both sides that he should be compensated for the same as extra service, by the allowance of a commission on the amount of such receipts and expenditures, then it is competent for the jury in this case to allow such commissions to the defendant on the said receipts and disbursements as the jury may find to have been agreed upon between the said commissioners and the defendant; or in the absence of any specific agreement fixing the rate of commissions, such rate as the jury shall find to be reasonable, and conformable to the general usage of the government and its departments in the like cases.

These instructions were entirely correct, and in conformity to the rules and principles laid down in the former part of this opinion.

Another bill of exceptions was taken to the ruling of the court, with respect to evidence of usage.

The record states, that upon the trial of this cause the defendant offered to prove, by the testimony contained in the preceding bill of exceptions, the general usage of the different departments of the government in allowing commissions to the officers of government upon disbursements of money under a special authority, not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage, but the court permitted the evidence to be given.

The real point of this exception is not very apparent. From the form in which it is put, it would seem that the objection was to the admission of *parol* evidence of the usage. But this probably was not the restricted sense in which the objection was intended to be made. The offer, however, was not to

introduce new evidence of usage, but to prove it by the testimony contained in the preceding bill of exceptions. It amounted, therefore, to nothing more than a mere inference or deduction from the evidence already before the court and jury, and which had been admitted without objection. But we see no grounds for objection against the usage offered to be proved, and the purpose for which it was so offered, as connected with the very terms upon which the defendant was employed to perform the services. It was not for the purpose of establishing the right, but to show the measure of compensation, and the manner in which it was to be paid. Mr Southard states that it was the understanding of the commissioners that the defendant was to receive compensation, in the mode and according to the practice of the government in other similar cases. And the usage offered to be shown was, that such compensation was made by allowing commissions on the disbursement of the money expended; and in this point of view it was entirely unexceptior able.

We are accordingly of opinion that the judgment must be affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia holden in and for the county of Washington, and was argued by counsel: on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

THE UNITED STATES, APPELLANTS v. JUAN PERCHEMAN, APPELLEE.

Juan Percheman claimed two thousand acres of land lying in the territory of Florida, by virtue of a grant from the Spanish governor, made in 1815. His title consisted of a petition presented by himself to the governor of East Florida, praying for a grant of two thousand acres, at a designated place, in pursuance of the royal order of the 29th of March 1815, granting lands to the military who were in St Augustine during the invasion of 1812 and 1813; a decree by the governor, made 12th December 1815, in conformity to the petition, in absolute property, under the authority of the royal order, a certified copy of which decree and of the petition was directed to be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form; a petition to the governor, dated 31st December 1815, for an order of survey, and a certificate of a survey having been made on the 20th of August 1819 in obedience to the same. This claim was presented, according to law, to the register and receiver of East Florida, while acting as a board of commissioners to ascertain claims and titles to lands in East Florida. The claim was rejected by the board, and the following entry made of the same. "In the memorial of the claimant to this board, he speaks of a survey made by authority in 1829. If this had been produced it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim." Held: that this was not a final action on the claim in the sense those words are used in the act of the 26th of May 1830, entitled "an act supplementary to," &c.

Even in cases of conquest, it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country.

The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should be generally confiscated, and private rights annulled on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed.

Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign.

The language of the second article of the treaty between the United States and Spain, of 22d February 1819, by which Florida was ceded to the United States, conforms to this general principle.

The eighth article of the treaty must be intended to stipulate expressly for

the security to private property, which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security, further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old. And those titles, so far at least as they were consummated, might be asserted in the courts of the United States, independently of this article.

The treaty was drawn up in the Spanish as well as in the English languages. Both are original, and were unquestionably intended by the parties to be identical. The Spanish has been translated; and it is now understood that the article expressed in that language is, that "the grants shall remain ratified and confirmed to the persons in possession of them, to the same extent," &c. thus conforming exactly to the universally received law of nations.

If the English and Spanish part can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.

No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly words of contract, stipulating for some future legislation, they are not necessarily so. They may import that "they shall be ratified and confirmed" by force of the instrument itself. When it is observed that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, the construction is proper, if not unavoidable.

In the case of Foster v. Elam, 2 Peters, 253, this court considered those words importing a contract. The Spanish part of the treaty was not then brought into view, and it was then supposed there was no variance between them. It was not supposed that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, it is believed it would have produced the construction which is now given to the article.

On the 8th of May 1822 an act was passed "for ascertaining claims and titles to land within the territory of Florida." Congress did not design to submit the validity of titles, which were "valid under the Spanish government, or by the law of nations," to the determination of the commissioners acting under this law. It was necessary to ascertain these claims, and to ascertain their location, not to decide finally upon them. The powers to be exercised by the commissioners ought to be limited to the object and purpose of the act.

In all the acts passed upon this subject previous to May 1830, the decisions of the commissioners, or of the register and receiver acting as commissioners, have been confirmed. Whether these acts affirm those decisions by which claims are rejected, as well as those by which they are recommended for confirmation, admits of some doubt. Whether a rejection amounts to more than a refusal to recommend for confirmation, may be a subject of serious inquiry. However this may be, it can admit of no doubt that the decision of the commissioners was conclusive in no

case until confirmed by an act of congress. The language of these acts, and among others that of the act of 1828, would indicate that the mind of congress was directed solely to the confirmation of claims, not to their annulment. The decision of this question is not necessary to this case.

The act of 26th May 1830, entitled "an act to provide for the final settlement of land claims in Florida," contains the action of congress on the report of the commissioners of 14th January 1830, in which is the rejection of the claim of the petitioner in this case. The first, second and third sections of this act confirm the claims recommended for confirmation by the commissioners. The fourth section enacts "that all remaining claims, which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions," &c. It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress in the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed upon those which were rejected. They were, of consequence, expressly submitted to the court.

From the testimony in the case, it does not appear that the governor of Florida, under whose grant the land is claimed by the petitioner, exceeded his authority in making the grant.

Papers translated from a foreign language, respecting the transactions of foreign officers, with whose powers and authorities the court are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the court; should be carefully examined, before it pronounces that an officer holding a high place of trust and confidence, has exceeded his authority.

On general principles of law, a copy of a paper given by a public officer, whose duty it is to keep the originals, ought to be received in evidence.

APPEAL from the superior court for the eastern district of Florida.

On the 17th of September 1830, Juan Percheman filed in the clerk's office of the superior court for the eastern district of Florida, a petition, setting forth his claim to a tract of land containing two thousand acres, within the district of East Florida, situated at a place called the Ockliwaha, along the margin of the river St John.

The petitioner stated that he derived his title to the said tract of land under a grant made to him on the 12th day of December 1815 by governor Estrada, then Spanish governor of East Florida, and whilst East Florida belonged to Spain.

The documents exhibiting the alleged title annexed to the petition were the following:

His excellency the governor:—Don Juan Percheman, ensign of the corps of dragoons of America, and stationed in this place, with due veneration and respect appears before your excellency and says, that in virtue of the bounty in lands, which, pursuant to his royal order of the 29th of March of the present year, the king grants to the military which were of this place in the time of the invasion which took place in the years 1812 and 1813, and your petitioner considering himself as being comprehended in the said sovereign resolution, as it is proved by the annexed certificates of his lordship brigadier don Sebastian Kindelan, and by that which your lordship thought proper to provide herewith, which certificates express the merits and services rendered by your petitioner at the time of the siege, in consequence of which said bounties were granted to those who deserved them, and which said certificates your petitioner solicits from your goodness may be returned to him, for any other purposes which may be useful to your petitioner: therefore, he most respectfully supplicates your lordship to grant him two thousand acres of land, in the place called Ockliwaha, situated on the margins of St John's river, which favour he doubts not to receive from your good heart and paternal dispositions. St Augustine, of Florida, 8th December 1815.

JUAN PERCHEMAN.

St Augustine, of Florida, 12th December 1815. Whereas this officer, the party interested, by the two certificates inclosed, and which will be returned to him for the purposes which may be convenient to him, has proved the services which he rendered in the defence of this province, and in consideration also of what is provided in the royal order of the 29th March last past, which he cites, I do grant him the two thousand acres of land which he solicits, in absolute property, in the indicated place; to which effect let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form.

ESTRADA.

PETITION. His excellency the governor:—Don Juan Percheman, sergeant of the squadron of dragoons of America, stationed in this place, with due veneration and respect appears before your excellency, and says, that in virtue of the royal

bounties in lands, granted by his majesty, by his royal order of the 29th of March of the present year, to the military individuals who were in this place aforesaid in the time of the invasion thereof, in the years 1812 and 1813, and your petitioner considering himself as included in the said royal resolution, as he proves it by the annexed certificates, exhibited with due solemnity, one of them from the brigadier Don Sebastian Kindelan, and the other with which your excellency thought proper to provide him, which certificates express the merits and services which he acquired and rendered in the time and epochs of the siege, in consequence of which the meritorious were thus rewarded, and which certificates your excellency will be pleased to return to your petitioner, for other purposes which may be useful to him, wherefore, your petitioner most respectfully supplicates your excellency to be pleased to grant him two thousand acres of land, in the place called Ockliwaha, situated on the margins of the river St John, which favour he doubts not to receive from the benevolent and charitable dispositions of your excellency. St Augustine, of Florida, on the 8th of December 1815.

JUAN PERCHEMAN.

DECREE. St Augustine, of Florida, on the 12th of December 1815. Whereas this officer interested proves by the two certificates annexed, and which will be returned to him for such purposes as may suit him, the services which he has rendered in the defence of this province, and also in consideration of the provisions of the royal order, under date of the 29th March last, which is referred to, I do grant to him, in absolute property, the two thousand acres of land, in the place which he indicates; for the attainment of which let a certified copy of this petition and decree be issued to him; which documents, will at all events serve him as a title in form.

ESTRADA.

I, Don Thomas de Aguilar, under-lieutenant of the army, and secretary for his majesty of the government of this place, and of the province thereof, do certify that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge; and in obedience to what is

ordered, I give the present in St Augustine, of Florida, on the 12th of December 1815.

TOMAS DE AGUILAR.

PETITION FOR SURVEY. His excellency the governor:—Don Juan Percheman, ensign of the corps of dragoons, and commandant of the detachment of the same, stationed in this place, with due respect represents to your excellency that this government having granted your petitioner two thousand acres of land in the place called Ockliwaha, on the margin of the river St John, he may be permitted to have the same surveyed by a competent surveyor, as soon and at any time your petitioner will find it convenient, which favour your petitioner hopes to receive from the high consideration of your excellency. St Augustine, of Florida, on the 31st December 1815.

JUAN PERCHEMAN.

St Augustine, 31st December 1815. The preceding petition is granted.

ESTRADA.

I, Don Robert M'Hardy, an inhabitant of this province, and appointed surveyor by decree of this government, rendered on the 31st December 1815, in behalf of the interested party; do certify that I have surveyed for Don Juan Percheman, lieutenant of the Havana dragoons, a tract of land containing two thousand acres, situated on the south side of Ockliwaha, and is conformable in all its circumstances to the following plat. In testimony whereof, I sign the present in St Augustine, of Florida, on the 20th of August 1819.

RT. M'HARDY.

The petitioner proceeds to state that his claim to said tract of land so claimed by him was submitted to the examination of the board of commissioners appointed under and in virtue of an act of the congress of the United States of America, entitled "an act for ascertaining claims and titles to lands in the territory of Florida, and to provide for the survey and disposal of the public lands in Florida," passed the 3d day of March 1823.

And that the land so claimed by him, and situated, as aforesaid, within the territory of Florida, and within the jurisdiction

of this honourable court, as aforesaid, is embraced by the treaty between Spain and the United States of the 22d of February 1819; that his claim to said land has not been finally settled under the provisions of the act of the congress of the United States, entitled "an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," passed the 23d day of May 1828, or of anv of the acts to which the said last recited act is supplementary; and that the claim of the petitioner to the said land has not been reported by the said commissioners appointed under any of the said acts of congress, or any other, or by the register and receiver acting as such, under the several acts of the congress of the United States in such case made and provided, as antedated or forged, and that the said claim hath not been annulled by the aforesaid treaty between Spain and the United States, nor by the decree ratifying the same.

Wherefore he prayed that the validity of his claim to said land may be inquired into, and decided upon by the court, and that, in pursuance of an act of congress for that purpose, in that case made and provided, the United States be made a party defendant to this petition, and that process, &c. &c.

On the 2d of October the attorney of the United States for the district of East Florida filed an answer to the petition of Juan Percheman, in which it is stated, that on the 28th of November 1823, he, the said Juan Percheman, sold, transferred and conveyed, to one Francis P. Sanchez, all his right, title and interest in the tract of land claimed by him; which, the answer asserted, appeared by a copy of the conveyance annexed to the action, and that he had not, at the time of the filing of his petition, any right, title or interest in the land. The answer admits that the claim of the said Francis P. Sanchez to the said tract of land was duly presented to the register and receiver of the district, while they were acting as a board of commissioners to ascertain titles to land in East Florida; and avers that the said claim was finally acted upon and rejected by the said register and receiver, while lawfully acting as aforesaid, as appears by a copy of their report thereon, annexed to the answer.

The United States further say that the tract of land claimed

by the petitioner contains a less quantity than three thousand five hundred acres, to wit, but two thousand acres by the showing of the petitioner himself, and that the court has no jurisdiction in the case, nor can any court exercise jurisdiction over the claim against the United States.

The answer submits, that if the governor Estrada did make the grant or concession set forth by the petitioner at the time, "and in the manner alleged in the said petition or bill of complaint, he made it contrary to the laws, ordinances, and royal regulations of the government of Spain, which were then in force in East Florida, on the subject of granting lands, and without any power or authority to do so, and that the said grant was and is therefore null and void; and that the right and title to said tract of land, consequently, is vested in the said United States, as will more fully appear by reference to the laws, ordinances and royal regulations aforesaid."

The proceedings of the register and receiver in the claim of Francis P. Sanchez, referred to in the answer, were as follows:

"This is a certificate of Thomas de Aguilar, that, in December 1815, Estrada granted Don Juan Percheman, cornet of squadron of dragoons, for services, two thousand acres of land, at a place called Ockliwaha, on the St John's river. In 1819, Percheman sold to Sanchez. In the memorial of the claimant to this board, he speaks of a survey made by authority in 1819. If this had been produced it would have furnished some support to the certificate of Aguilar. As it is, we reject the claim."

The petitioner, by an amended petition filed on the 14th of December 1830, stated that the register and receiver of the United States for East Florida, in their final report on the land claims, transmitted on the 12th December 1828 to the secretary of the treasury, reported the claim of the petitioner as rejected on the ground that the claim depended on a certificate only of Don Thomas Aguilar, notary of the Spanish government in East Florida; and he averred that his claim depended on an original grant or file in the office of the public archives of East Florida, a certified copy of which is filed with the petition in the court, dated 8th December 1815.

The amended petition also states that the sale made by him

of the tract of land described in the original petition, was a conditional sale and no more.

It also states that the register and receiver further reported that the survey of the tract of land, made by the authority of the Spanish government, was not produced to them: but the petitioner avers the contrary, for that the survey was filed with the claim and was before them when they examined the same, for the truth of which averment a certificate from the keeper of the office of archives was filed with the amended petition.

On the hearing of the case before the supreme court for the district of East Florida, the claimant, by his counsel, offered in evidence a copy from the office of the keeper of public archives of the original grant on which this claim is founded; to the receiving of which in evidence the said attorney for the United States objected, alleging that the original grant itself should be produced, and its execution proved, before it could be admitted in evidence, and that the original only could be received in evidence: which objection, after argument from the counsel, was overruled by the court, and the copy from the office of the keeper of the public archives, certified according to law, was ordered to be received in evidence. And the court further ordered, that though by the express statute of this territory, copies are to be received in evidence, yet, in cases where either the claimant or the United States shall suggest that the original in the office of the keeper of the public archives is deemed necessary to be produced in court, on motion therefor, a subpœna will be issued by order of the court to the said keeper, to appear and produce the said original in court for due examination there.

The court proceeded to a decree in the case, and adjudged that the claim of the petitioner as presented was within its jurisdiction—"that the grant is valid, that it ought to be, and by virtue of the statute of the 26th of May 1830, and of the late treaty between the United States and Spain, it is confirmed."

The United States appealed to this court.

The case was argued by Mr Taney, attorney-general, for the United States; and by Mr White, for the appellee.

For the United States it was contended:

1. That the copy of the grant and other proceedings produced by the petitioner, were not admissible in evidence, but the original papers ought to have been produced.

2. That the court had not jurisdiction of the case under the act of congress of May 26, 1830; the claim in question having been finally acted upon and rejected by the register and receiver.

3. If the court had jurisdiction of the claim, the suit could be maintained only by Francis P. Sanchez, to whom Percheman had conveyed his interest; and the court erred in confirming and decreeing the land to Percheman.

4. That if these points are against the United States, the authority exercised by the Spanish governor in making the grant to the appellee, was not within the royal order of the king of Spain.

As to the first point, the admissibility in evidence of certified copies of the grant and other proceedings, the attorney-general cited the act of congress of May 26, 1824, sect. 4, of May 23, 1828, and the Laws of Florida of July 3, 1823, sect. 4.

As to the second point, that the court had not jurisdiction of the case under the act of May 26, 1830, the claim having been finally acted upon and rejected; he cited the fourth section of that law. The acts of congress made the decision of the commissioners, and afterwards of the register and receiver, final in all cases under three thousand five hundred acres. For the correctness of this position he referred to the various provisions of the laws on the subject of the claims to lands in Florida, which are found in the first, fourth, fifth and sixth sections of the act of May 8, 1822; the second section of the act of March 3, 1823; the fourth and fifth sections of the act of February 8, 1827; and the fourth and sixth sections of the act of May 23, 1828. The language and provisions of all these laws, he contended, sustain the position that the decision of the register and receiver upon the claim of the appellee was final, as his claim was within three thousand five hundred acres.

The act of congress of May 26, 1824 gave jurisdiction to decide on all claims to lands in Missouri. In Arkansas the jurisdiction was confined to claims not exceeding one league

square. No argument can therefore be drawn in favour of the jurisdiction in Florida from that given in Missouri.

The restrictive words in the act of 1828 are not in the act of 1824; and their introduction shows that the legislature, warned by experience, did not mean to give the same jurisdiction which it had given before.

Nor did the act of 26th May 1830 mean to extend the jurisdiction beyond that given by the law of 1828. It uses strong words of restriction. It refers to the jurisdiction given by the law of 1828, and not that given by the act of 1824.

It is said, that the act of 1830, section 4, would be nugatory according to this construction. If that were the case, it would not alter the plain meaning of the words.

The legislature intended to provide for any cases which, in the various legislation on that subject, might, by possibility, be found not to have been finally acted on, and to supersede the necessity of further legislation. The fact that no such case existed, and that there is nothing for it to operate on, and that there were no cases brought to the view of the legislature for which this section provides, cannot affect its construction.

Congress meant to provide for any unforeseen contingency, and any cases unknown or overlooked, which had not been finally acted on.

As to the third point, that if the court had jurisdiction, the claim could only be maintained by Francis P. Sanchez, it was argued, that the provisions of the act of 1824 required that the party having title must file the petition: the language of the section which gives the power to the commissioners to decide is, "to hear and determine all questions relative to the title of the claimants." Thus, the title under which a claimant presents himself must be exhibited, and the decision of the commissioners, and afterwards of the register and receiver, must be upon the title. The conveyance of the appellee to Sanchez was absolute; it gave him all the title and rights derived from the grant of the Spanish governor; it made him the legal owner of the tract of land described in the grant; and thus by him only, or by those holding under him, could a petition be presented under the provisions of the act of congress.

The petition of the appellee was a suit in chancery against

the United States, by a person who claims the title against every one else, and he must show his title, and establish it as a complete title, before he can be relieved. Cited, act of congress of 1824, sect. 6; act of 1830, sect. 4. How can land be decreed to one in a court of chancery, when it appears to the court that he is not entitled to it, and that another is the owner of it?

To sustain the position that governor Estrada was not authorized by the royal order of the king of Spain to make the grant to the appellee, it was argued, that the powers of the governor did not extend to the issuing of grants for so large a tract of lands as that claimed by the petitioner in this case. The royal order of March 29, 1815, White's Collection of Land Laws, 248; the letter of governor Kenderland to the captain-general of Cuba, White's Collection of Land Laws, 247, were cited. Also, The United States v. Arredondo, 6 Peters, 727, 728.

Mr White, for the appellee.

The appellee, who was petitioner in the court below, obtained a decree of confirmation to his claim of two thousand arpens of land in East Florida.

From that decree the United States have appealed, and the grounds upon which that appeal was taken, have been explained by the attorney-general. This case is one of great importance, because it involves a principle common to a number of others, and more especially because it concerns the honour and good faith of the government of the United States. The title set up by the petitioner, an officer in the service of the king of Spain, is admitted to be genuine.

It was made by the governor of East Florida, in pursuance of a royal order promulgated in 1815.

It was made to one of the officers, specially designated as a person intended to be benefited by the royal bounty which dictated the ordinance. The grant was made as a remuneration for services rendered by the claimant to the province at a time of great peril, occasioned by external invasion and internal insurrection. The grant was made prior to the limitation contained in the treaty, and was presented to the commissioners

appointed to ascertain claims and titles to land in East Florida. Upon this state of the facts presented on the record, three points will be submitted on the part of the appellee to the consideration of the court, and relied upon in support of the decree of the court below.

1. This title was confirmed by the treaty of the 22d of February 1819.

2. It is not competent for congress to pass any law authorizing any tribunal created under its authority to invalidate such a title.

3. By the act of 1830 this court has jurisdiction of the case. The first point involves the construction of the treaty. Whether is the eighth article executory or executed? This requires an examination into the article itself, and the negotiations which led to it.

By the treaty of the 22d of February 1819, Spain ceded the Floridas to the United States.

The latter acquired these provinces and their appendages in full sovereignty, including all public grounds and edifices, and all vacant lands which were not private property. Article 2d.

It was stipulated between the high contracting parties that all grants made by his cathelic majesty, or his lawful authorities, before the 24th of January 1818, in the ceded territory, should remain confirmed and acknowledged, in the same manner as they would have been if the provinces had continued under the dominion of his catholic majesty. Article 8th. Further time was given to proprietors who had been prevented from fulfilling the conditions of their grants by the recent circumstances of the Spanish monarchy, and the revolutions in Europe.

The inhabitants of the ceded territory were protected in all their rights, and became citizens of the United States. Articles 5th and 6th.

Congress has, from time to time, adopted various legislative provisions for the purpose of preserving the national faith, separating private property from the public domain, and securing the individual titles intended to be protected by the treaty.

Commissioners were appointed to examine land claims, with authority to confirm grants not exceeding a certain size, and

to report those above that limit to congress. When these commissions were dissolved, similar powers were vested in the register and receiver of the land offices. In some instances, an option was given to the holders of certain grants to select a league square within their respective concessions, upon condition of surrendering the residue by deed to the United States. Through these and other means, the titles of the smaller proprietors have, for the most part, been definitively adjusted, and the larger claims alone remain for settlement. These, congress, by act of 23d May 1828, authorized the courts of the territory to hear and determine, with an appeal to the supreme court of the United States. Several cases have been adjudicated in the courts below. Decisions have been pronounced, not easily reconcilable, if not at total variance with each other: appeals have been taken, and the questions discussed are now before this court, whose judgment is deeply interesting, not merely to the parties on the record, but to the numerous other suitors whose rights, or supposed rights, depend on similar principles.

One or two considerations of a general nature may here, it is presumed, be not inappropriately introduced. Those who represent the interests of the United States in some of the cases before the court, have thought proper to assume, as one ground of defence, that the confirmation or rejection of these titles is matter essentially of executive or legislative cognizance, and addresses itself exclusively to their discretion. The question they urge is a political, not a judicial one, and is equally unfit to be submitted to, and incapable of being decided by a court. Waiving all considerations of the hardship and mockery of referring claimants under a treaty to a tribunal incompetent to afford them redress—forbearing to touch on the indecorum of a construction which attributes to congress an act of futile or deceptive legislation—it will be enough to say that this interpretation, it is believed, has been once considered and rejected. Soulard's case, 4 Peters, 511.

The argument, indeed, amounts to little more than this—we have bound ourselves to do what Spain would have done. What that is, we know not: and having referred the question to those who cannot decide it, we will therefore do nothing.

Perfidy often wears the mask of subtlety, as well from shame as cowardice: but it is seldom that the counsellors of bad faith, if they condescend to argue at all, are satisfied with a defence so feeble.

The act of congress requires the court to examine and decide upon these claims in conformity with the law of nations, the treaty, and the laws of Spain.

It is proposed to consider the subject in reference to each of these several rules of decision.

1. The law of nations.

It is conceived that, according to the mitigated rights of war, as now well understood and settled by international law, the lands of individuals are safe even after conquest, Vattel, b. 3, c. 13, sect. 200: much less can a cession, of itself, destroy private rights. Absolute or perfect grants, it is believed, would be protected by the law of nations, independent of the treaty. Some legislative recognition of their validity might indeed be necessary to sustain a suit upon them in our courts, but the national obligation to respect them could hardly be denied. It is in behalf of concessions or inchoate grants that the stipulations of the treaty were most requisite and important. To the acts of the Spanish government in this respect, not merely the authority of *res adjudicata*, such as belongs to all foreign sentences and decrees, was given by the treaty; its effect was to make binding on us, all that would have been valid against Spain; and to oblige us to complete whatever she, in good faith, had begun, but left unfinished.

A detailed examination of the maxims of customary international law, as they would bear upon the rights of proprietors of land in Florida, is not called for in the presence of an express treaty stipulation; and, in referring to the law of nations as a rule of decision for the courts, congress perhaps had more expressly in view such part of it as relates to the interpretation of treaties. This will be more conveniently considered under another head.

2. The treaty.

This instrument, it is contended, should be most liberally construed. Its interpretation is to be sought in the motives and policy of the parties, in their words, and in their acts.

The leading objects of the United States were, to procure a more convenient and secure frontier; to command the Gulf of Mexico, the outlet of a large portion of their commerce; to obtain indemnity for their merchants, and to secure themselves against the annoyance they must naturally expect from Florida, in the hands of an enemy, or a false or feeble neutral. It is notorious that for more than a century this territory had been a constant source of injury, jealousy, and vexation to the adjoining colonies and states. The colony of Georgia was founded as a barrier against the encroachments of the Spaniards; and the refuge and encouragement afforded by the latter to absconding slaves, hostile Indians, and other incendiaries, was a continued cause of complaint, from the settlement of Carolina to the Seminole campaign. In examining the interests and duties of the United States in connexion with this subject, it is not as landed proprietors alone that we must regard them. The rage for new settlements, indeed, makes this the chief point among the people, and greatly increases the prejudices against the large grants; but the court is far above the contagion of their example.

To consider the cession of Florida merely as a land-jobbing transaction, would be doing great injustice to the liberal and enlightened policy which sought this valuable acquisition, with steady calmness, through so long a course of evasion and delay. Yet its value even in that point of view is not unworthy of notice. Thirty-five millions and a half of acres, of which up to the 30th of June 1828, but little more than a million and a half had been granted or sold, (Reports of Committees, H. R. No. 95, 2d session 20th congress), will surely, after making a most liberal allowance for the satisfaction of unsettled land claims, more than refund to us the five millions paid to our own merchants. Computing but thirty millions at the minimum price to which it is proposed to reduce the refuse lands, the United States will receive back their principal from the soil, and obtain the sovereignty for nothing.

It is admitted that, in the cession of a province, the disposition of the inhabitants and their effects is a question of policy between the parties. To divest them of their rights of property is, however, in modern times, an unheard of cruelty. Usually

the option is allowed them of becoming subjects of the new government, or of selling their estates, and removing within a specified period. Such were the terms of cession of this very province from Spain to Britain in 1763; and from Britain to Spain twenty years afterwards. It will be borne in mind by the court that population rather than land is the want of the United States; that their policy as to naturalization is as liberal as that which the wisest modern philosopher has praised in the greatest of the ancient republics; and that sovereignty, not soil, was the great motive for the acquisition.

Our government, it may safely be affirmed, neither contemplated the expulsion of the ancient inhabitants, nor any injury to their property. The terms held out in the treaty ceding Louisiana, as well as that by which Florida was acquired, show that the United States never intended to grasp a barren sceptre, and wave it over a dispeopled territory. The inhabitants were made citizens. The province was to become a state. Can it be imagined that any rational government would act so unwisely, as to receive into their society a large body of foreigners, endow them with civil rights and political power; and, after rendering them disaffected, by stripping them of their property; leave to these malcontents the protection of an extensive, important, and exposed frontier?

Many of the motives which must have operated on Spain are equally obvious. She naturally wished to extinguish demands, the justice of which had been admitted, while their satisfaction had been evaded until all the arts of procrastination were exhausted. She might desire to get rid of a useless and expensive appendage; and she must have foreseen that it would probably be wrested from her as an indemnity, if she trifled much longer with our patience. But, in yielding up the inhabitants with the territory, she would naturally stipulate most favourably for the people she was about to surrender. She did not intend to sacrifice them. Their fidelity to her in every vicissitude; the temptations by which they had been assailed; the invasions to which they had been exposed; their sufferings, their constancy, their very helplessness, all pleaded powerfully in their favour.

In the eighth article, two parties were stipulating for the

security and advantage of a third, whom both had the strongest reasons to cherish and protect. It is submitted, therefore, with some degree of confidence, that, so far as the motives and policy of the parties afford a key to the meaning of their words, the construction most favourable to the claimants is permitted to, nay, is enjoined upon the court.

Before proceeding to examine the language of the treaty, a few observations on the rules of interpretation may, perhaps, be pardoned. Jurists generally admit that all grants, contracts, and stipulations are to be taken most strongly against the grantor. Cooper's Justinian, in note, 601. The words of the party promising are to be regarded rather than those of the party to whom the promise is made. Vattel, b. 2, c. 17, sec. 267. Other general rules are to be found in the works of the most esteemed publicists, and must be familiar to the court. Grotius, b. 2, ch. 16, p. 136. Vattel, b. 2, ch. 17, sec. 270. Among the rest, that interpretation which is drawn from the reason of the act is strongly and safely recommended. Vattel, b. 2, c. 17, sec. 287. A special rule of construction has, moreover, been deduced from the character of the stipulation itself. Hence the distinction between things favourable and things odious—a distinction recognized by Grotius and Vattel. Grotius, b. 2, ch. 16, sec. 10, p. 148. Vattel, b. 2, ch. 17, sec. 300, 301, 303. The difference between the former, and mere acts of liberality prejudicial to the sovereign, is illustrated by the last named author, (Vattel, b. 2, ch. 17, sec. 310), in such a manner as leaves no doubt to which class the provisions of the eighth article belong.

What, indeed, can be more clearly entitled to rank among things favourable than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that country which is about to receive them as citizens?

This brings us to the words of the treaty. There is a difference between the English and the Spanish versions of the eighth article. Both are equally originals, but surely the justice and liberality of the United States will extend to the claimants the full benefit of either. The first difference is in render-

ing "*concesiones de terrenos*" as "grants of land." *Concesiones*, it is apprehended, is a term much broader than *grants*, and comprehends all which we, in the technical language of our land laws, might call entries or warrants of survey or location. The substitution of *lawful*, in the English, for *legitimos*, in the Spanish, will be commented on in another place. The residue of the clause, that those grants *shall be* ratified and confirmed to the persons in possession of *the lands*, to the same extent that the same grants would be valid, &c. is by no means equivalent to the Spanish phraseology. The latter, fairly rendered, is to this effect: "All concessions of lands made by his catholic majesty, or by his legitimate authorities, before the 24th January 1818, in the aforesaid territories, which his majesty cedes to the United States, shall remain confirmed and acknowledged to the persons in possession of them (i. e. the concessions), in the same manner that they would have been if the dominion of his catholic majesty over these territories had continued."

The difference between declaring that these *grants shall be* ratified and *confirmed* to the persons in possession *of the lands*, to the *same extent* that the *same grants* would have been valid, &c., and saying that all *concessions* of land shall *remain confirmed* and *acknowledged* to the persons in possession *of them* (i. e. the title papers), in the *same manner that they would* have been, &c., is sufficiently obvious and important. The sense is materially different. The English side of the treaty leaves the ratification of the grants executory—*they shall be ratified;* the Spanish, *executed*—they shall *continue acknowledged* and confirmed, *quedaran ratificados*. *Quedan* signifies remain or continue, and in this sense is used in the last clause of the same article—*quedan anuladas y de ningun valor*, remain null and o. no effect. In the English, possession refers to the *lands;* in the Spanish, to the *grants*. The relative *ellas* agrees with the antecedent *concesiones;* if it referred to *terrenos*, the relative would have been *ellos*. No word equivalent to recent is to be found in the Spanish.

It has been supposed, with little reason, that the eighth article might be interpreted to confer a discretion, rather than impose an obligation on the American government. It is one of the admitted rules of construction, that interpretations which

lead to an absurdity, or render an act null, are to be avoided. Vattel, b. 2, ch. 17, sec. 282, 304.

The king of Spain can annul a grant made by himself without any allegation of surprise or fraud, simply in virtue of his absolute will and sovereign power. It is too late for us to deny that position; we have recognized it by the treaty. The grants to Alagon, Vargas, and Punon Rostro were annulled. By the treaty we succeed to all the rights of Spain: the concessions made by Spain are to continue valid to the same extent, &c.: but will it be asserted that, in succeeding to the rights of Spain, we succeed to the right of his catholic majesty to annul the grants of his subjects? Can it be pretended that the provisions of the eighth article were designed only to leave all grants, perfect and inchoate, as completely at the mercy of the American government as they had been at that of the Spanish monarch?

In attempting to ascertain the true meaning of the parties, it is humbly conceived we are not confined to the language of the treaty. We may look into the negotiations which preceded it. In this instance, there is a particular propriety in doing so. "As the instrument of ratification, an essential part of the whole treaty refers to the history of the negotiation: it lets in the whole of that history, as matter to be adverted to, according to all the strictness of legal argument, in reasoning on the construction of the claim in question. The matter is thus made capable of being argued as if the question were upon an act of parliament, or private deed reciting the circumstances under which it was obtained. One might, therefore, rest, as elucidating the case, upon all the authorities which establish, with respect to private and diplomatic instruments, that, however general and comprehensive particular expressions may be, they ought, in their effect, to be confined to the particular object the parties had in view. The reports of the court of chancery in England contain a variety of instances as to the restriction of deeds, however widely expressed, to the particular object of the parties, founded on a review of the circumstances under which they were made. (Vide Cholmondly and Clinton.) It is also observed by Vattel (268), that we are to interpret a clause in the utmost latitude that the strict

and appropriate meaning of the words will admit of, if it appears that the author had in view every thing which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense when it appears probable that the author did not mean it to extend to every thing which the strict propriety of the terms might be made to include." MS. Opinion of sir John Joseph Dillon on Rattenbury's grant.

A short sketch of the negotiations, with some brief extracts and references, will therefore be submitted. In January 1818 the government of the United States proposed to the Chevalier de Onis to terminate all differences in the following terms:

1. Spain to cede all territory eastward of the Mississippi.
2. The eastern boundary to be the Colorado.
3. Claims for indemnities to be referred to commissioners.
4. The lands in East Florida, and to the Perdido, to be held as security for the indemnities; but no grant subsequent to August 11, 1802, to be considered valid.
5. Spain to be released from the payment of the debts. Lyman's Diplomacy U. States, vol. 2, p. 133.

On the 24th October 1818, Don Luis de Onis proposes to cede the Floridas: "the donations or sales of land made by the government of his majesty, or by legal authorities, until this time, are nevertheless to be valid." 1 Executive Papers, 1st sess. 16th cong. 1819, 1820, doc. 2, p. 25.

The secretary of state replies, October 31, 1818, "neither can the United States recognize as valid all the grants of land until this time, and at the same time renounce all their claims for indemnity." He adverts to the notice given to the government of Spain, that all the grants lately made within those territories (i. e. to Alagon, Vargas, &c.) must be cancelled, unless some other adequate fund should be provided to satisfy the claims of the United States and their citizens. 1 Executive Papers, 1st sess. 16th cong. 1819, 1820, doc. 2, p. 25.

De Onis rejoins, 10th November 1818, "my second proposal has been admitted by your government, with this modification, that all grants and sales of land made by his catholic majesty, or by lawful Spanish authorities in the Floridas, from the year 1802 to the present, shall be null and void. To this modification, in its absolute sense, I cannot assent, in as much

as it is offensive to the dignity and imprescriptible rights of the crown of Spain; which, as the legitimate owner of both the Floridas, had a right to dispose of those lands as it pleased: and, further, as the said modification would be productive of incalculable injury to the bona fide possessors, who have acquired, settled, and improved those tracts of land."

"The extent of what I can agree to is, that the late grants made by his catholic majesty in the Floridas since the 24th of January last, the date of my first note, announcing his majesty's willingness to cede them to the United States (the said grants having been made with a view to promote population, cultivation and industry, and not with that of alienating them), shall be declared null and void, in consideration of the grantees not having complied with the essential condition of the cession, as has been the fact." 1 Ex. Papers, 1st sess. 16th cong. doc. 2, p. 26.

On the 9th of February 1819, the minister of Spain submitted his project of a treaty. The ninth article, answering to the eighth of the present treaty, is as follows:

"All grants of lands made by his catholic majesty, or his legitimate authorities, in the aforesaid territories of the two Floridas, and others which his majesty cedes to the United States, shall be confirmed and acknowledged as valid, excepting those grants which may have been made after the 24th of January of last year, the date that the first proposals were made for the cession of those provinces, which shall be held null, in consideration of the grantees not having complied with the conditions of the cession." 1 Ex. Papers, 1st sess. 16th cong. doc. 2, p. 37.

On the 13th of February 1819, the American secretary offered his counter project, in which the eighth article proposed stands thus:

"All grants of land made by or in the name of his catholic majesty in the aforesaid territories, after the 24th of January 1818, shall be held null, the conditions of the said grants not having been performed by the grantees. All grants made before that date by his catholic majesty, or by his legitimate authorities in the said territories, the conditions of which shall have been performed by the grantees according to the tenor of

their respective grants, and none other, shall be confirmed and acknowledged as valid." 1 Ex. Papers, 1st sess. 16th cong. doc. 2, p. 43.

In the minute or protocol of conferences preserved by M. Hyde de Neuville, whose good offices were interposed on this occasion, the following entry will be found:

"*Article eighth.* This article cannot be varied from what is contained in the chevalier's project, as the object of the last clause therein is merely to save the honour and dignity of the sovereignty of his catholic majesty.

"*Note of Mr Adams thereon.* Agreed, with the following explanation: that all grants of land which shall not be annulled by this convention are valid to the same extent as they are binding on his catholic majesty.

"*Remarks of M. De Neuville.* The secretary of state observed to me, that the federal government would, most assuredly, never entertain the idea of disturbing individuals who were vested with a bona fide title to their property; but, as a treaty ought not to cover fraudulent practices, so no more could be asked of the United States than could be offered by his catholic majesty; that, being in this case substituted for his majesty, they would scrupulously fulfil their engagements, but that more could not be expected of them.

"The secretary of state even proposes, if M. De Onis wishes it, that the article shall be inserted in the treaty as proposed by the minister of Spain, on condition that the above explanation shall be given in the form of a note. The federal government, unwilling to leave any thing in a state of doubt or uncertainty, only wish to place on the most secure footing whatever is just and honourable, and is at the same time perfectly satisfied that his catholic majesty neither asks nor wishes more." 1 Ex. Papers, 1st sess. 16th cong. doc. 2, p. 48.

The eighth article was finally inserted as it at present stands; but doubts arising whether the recent large grants were effectually excluded by the words of the treaty, Mr Adams writes to the Chevalier De Onis on the 10th March 1818, that it was distinctly understood that the grants to Alagon, Vargas and Punon Rostro, were all annulled by the treaty, as much as if they had been specifically named, and that they will be so

held by the United States. 1 Ex. Papers, 1st sess. 16th cong. doc. 2, p. 63.

Mr Adams, on the 14th July 1819, submits to M. De Neuville the following observations on the eighth article: "M. De Neuville's particular attention is requested to the difference between the two projected articles, because it will recall particularly to his remembrance the point upon which the discussion concerning this article turned. By turning to the written memorandum, drawn up by M. De Neuville himself, of this discussion, he will perceive he has noted that M. De Onis insisted that this article could not be varied from what was contained in the chevalier's project, as the object of the last clause therein was merely to save the honour and dignity of the sovereignty of his catholic majesty."

It was then observed by Mr Adams, that the honour and dignity of his catholic majesty would be saved by recognizing the grants prior to the 24th of January, as "valid to the same extent as they were binding on his catholic majesty;" and he agreed to accept the article as drawn by M. De Onis, with this explanation. (See M. De Neuville's memorandum.) It was on this occasion that M. De Neuville observed, that, if the grants prior to January 24, 1818, were confirmed only to the same extent that they were binding on the king of Spain, there were many bona fide grantees, of long standing, in actual possession of their grants, and having actually made partial settlements upon them, but who had been prevented by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of their grants; that it would be very harsh to leave these persons liable to a forfeiture, which might indeed, in rigour, be exacted from them, but which very certainly never would be, if they had remained under the Spanish dominion. It will be remembered by M. De Neuville how earnestly he insisted upon this equitable suggestion, and how strongly he disclaimed for M. De Onis every wish or intention to cover, by a provision for such persons, any fraudulent grants. And it was then observed by M. De Neuville, that the date assumed, of 24th of January 1818, was not sufficient for guarding against fraudulent grants, because they might be easily antedated. It was with refer-

ence to these suggestions of M. De Neuville, afterwards again strenuously urged by M. De Onis, that the article was finally modified as it now stands in the treaty, declaring all grants subsequent to 24th January 1818, absolutely null, and those of prior date valid to the same extent only that they would have been binding on the king; but allowing to bona fide grantees, in actual possession, and having commenced settlements, but who had been prevented by the late circumstances of the Spanish nation, and the revolutions in Europe, from fulfilling all the conditions of their grants, time to complete them. The terms of the article accord precisely with the intentions of all the parties to the negotiation, and the signature of the treaty. If the dates of the grants are subsequent to the 24th of January 1818, they are annulled by the date; if prior to that date, they are null, because not included among the prior grants confirmed. 1 Ex. Papers, 1st sess. 16th cong. pp. 68, 69.

From all these documents, the clear inference is, that the great subject of anxiety with our negotiator was the large grants to Alagon, Vargas, and Punon Rostro. It was against them almost alone that the article was directed. The American government, indeed, at one time, proposed to carry the date back to 1802, by which means they would have excluded the claims of Forbes, Arredondo, and others, with whose existence there is *every reason to believe* they were perfectly well acquainted. But this pretension was speedily abandoned. If there appeared a distinct declaration on the part of the American government that the sole object of the eighth article was to exclude the grants to Alagon, Punon Rostro, and Vargas, such declaration, it is apprehended, would be conclusive. It could no longer be deemed just or honourable to apply the question ordinary and extraordinary to other grants, dated before the 24th January 1818, with a view of extorting from them by legal subtlety something which should debar their proprietors the benefits of that very article which was framed solely to admit them, and to exclude others. Yet, it is respectfully submitted, that no express admission of the fact could be stronger than the implication arising from this correspondence. If, however, an explicit avowal on the part of our government will alone be received, we refer to the message of the president to congress, in which

he tells that body, "it was the intention of the parties to annul these latter grants, and that clause was drawn for that express purpose, and none other." 1 Ex. Papers, 1st sess. 16th cong. 1819, 1820, doc. 2, p. 5.

May we not ask whether this is the sole purpose to which it is now sought to be applied, and how far it is consistent with justice and good faith to extend the effect of the clause in question beyond what either of the parties contemplated at the time of its adoption?

The application of the common law principle, that a grant may be absolutely void where the officer issuing it had no authority, is insisted on: and it is asserted that the royal governors of the Spanish colonies had no power to make sales or donations of the public lands, except in very limited quantities and under numerous restrictions. An inquiry into the truth of this assertion will be attempted, according to the limited means within our power; and the more readily because of the intimations thrown out by this court in the cases of Soulard and Smith. 4 Peters's Reports.

Every fair presumption is against these supposed limitations. Legal or constitutional restrictions upon the power of the king or his officers, according to our ideas of them, are inconsistent with the character of the Spanish monarchy. They are hardly comprehensible by a native of that country, and have been rejected, together with the constitutional monarchy, by the people of Spain. How is it possible to reconcile limitations of power with the fundamental maxim, "the will of the prince has the force of a law?"

Portions of the royal authority, as arbitrary as that of the king himself, were entrusted to the several governors of provinces, each of whom, within the limits of his own government, was the image of his sovereign, and, in practice at least, and in popular opinion also, absolute. The only restraints upon his acts were his instructions, and accountability to the king; but the royal instructions, and the *residencia*, or account of his transactions, which the governor was obliged to give, were not properly legal limitations upon his power, but rather directions for the exercise of his discretion, and securities for his good behaviour.

Every nation has its own manner of securing the fidelity of its agents. Free governments are constructed upon the principle of entrusting as little power as possible, and providing against its abuse *preventively* by all species of checks and limitations. Arbitrary ones proceed upon the principle of bestowing ample powers and extensive discretion, and guarding against their abuse by prompt and strict accountability and severe punishment. Both have been invented by mankind for purposes of mutual defence and common justice, but the pervading spirit of the one is *preventive*, of the other *vindicatory*.

How absurd would it be, then, to apply the maxims of the one government to the acts of the other. As well might we judge the life of Pythagoras by the law of the New Testament, or the philosophy of Zoroaster by that of Newton; as subject the administration of a Spanish governor to the test of magna charta, the bill of rights, the habeas corpus act, or the principles of American constitutional law.

Even the laws of the Indies, obscure, perplexed, and sometimes even unintelligible as they are, hardly reached across the ocean; and the decline of the Spanish, like that of the Roman empire, was marked by the *absolutism* of the distant prefects.

Nor were the offices of captain general, intendant or subdelegate, sinecures. Entrusted with the command and defence of remote and exposed possessions; often reduced to the greatest extremities, for the want of money and supplies; neglected by the feeble government of the mother country, they were yet expected to guard the colony, and execute the most rigorous system of monopoly, amid greedy neighbours and an impoverished people. They were frequently obliged to create their own resources; and some idea of their difficulties, and the devotion and address which surmounted them, may be formed by remembering how long the able but cruel Morilla protracted a desperate warfare, amid every species of distress and destitution.

Their first duty was to preserve his catholic majesty's province, committed to their care; and if they did it, and could only do it by some invasions of the fisc, or dilapidations of the royal domain; does it lie with us to complain of their fidelity to

him, and vitiate those titles which were devised from a law above all others—necessity? Vide White's Land Laws, 235; 7 Ex. Doc. p. 2, 1824, 1825. Also, MS. Extracts from Col. M'Kee's Correspondence. See also the letter of Gov. Chester to the Earl of Dartmouth, MS. Letter Book, West Florida, 18th Nov. 1775, p. 34.

This general outline of the treaty, the negotiations which led to it, the objects of the contracting parties, cannot fail to be considered by the court in the adjudication of every case presented to it. If it be considered, as it has been proved and admitted in part in another case decided at the last term, that the treaty itself operated as a confirmation of every legitimate and valid title which "emanated from his catholic majesty, or his lawful authorities prior to the 24th of January 1818;" it only remains to be shown that this was such a title.

Juan Percheman was an officer in the Spanish service at the period of the invasion of that province in 1812, 1813. He was referred to by name in the royal despatch, and this grant was made in absolute property to him as a remuneration for his services.

How is it attempted by the government agents to defeat so just and equitable a claim? The first ground taken is, that "the copy of the grant is not admissible evidence; but the *original* ought to have been produced and proved."

This involves the question, what is *a copy*, and what an original, under the Spanish government; as defined by the Spanish laws. This is a paper certified by the escribano of government to be a full copy of the petition and decree of the governor of East Florida. It is, in fact, the original grant. The petition and decree of the governor are preserved in the office of the escribano, are placed there in paper books as composing the *dilligencias* of his office.

These papers never go out, any more than the notes of the surveyors, upon which a grant issues in the United States. In this country the original patent, signed by the governor or president, is delivered to the patentee, and the copy is retained in the office. Now, if we are asked why this is so, the answer is, "ita lex scripta est." It is the law and the custom of Spain and her provinces; and it would be as reasonable to ask, why

has she not adopted the common law of England? The decree of the governor has been certified under his seal of office, and the seal and signature proved.

The second point relied upon by the agents of the United States, to avoid the confirmation of this grant, is, the court has not jurisdiction, the claim having been finally settled by the rejection of the register and receiver.

If the title was confirmed by the treaty, which is the supreme law of the land, the United States have no power to create a tribunal "finally to reject a claim," without an appeal to this court. Such an act would directly violate the treaty, and must be considered void.

The decisions of the commissioners and register and receiver have never been considered final by congress itself. In every report made since the date of the Louisiana treaty upon claims, which the commissioners nominally had power to decide, an act of congress has been deemed necessary to consummate the title.

There is a case in point in the very act relating to the report, in which it is contended that this claim has been finally rejected.

The first section of the act of congress to *confine it*, provides, that all the cases except those subsequent to a certain period, are confirmed and approved. Here the government agents have two horns of a dilemma. If the decrees of this register and receiver, like the laws of the Medes and Persians, are irreversible, it must operate both ways. It will not do for any honest government to say it is final when in our favour, *aliter* when against us. If the proposition be maintained that a register and receiver appointed to sell lands, and who were not selected with reference to their ability to decide those delicate legal questions, have been invested with such extraordinary powers over the rights of individuals; it will follow of course that all such as were excluded by congress were improperly excluded, and the decision which bars the hope of redress against this claim will give confirmation to all those rejected. A contrary doctrine would involve the absurd consequence of the assumption by congress of judicial power, and of its exercise in reversing the decisions of a tribunal vested with authe-

rity by law to decide in the last resort, or, to use the language of the attorney-general, "finally to decide." The register and receiver never had such a power, and it was not competent to congress to confer it without a palpable violation of the treaty. The register and receiver never had power to decide this case at all, and consequently could not have rejected it. The cases which were authorized to be presented to commissioners, divided themselves into two classes, one of which the commissioners decided subject to the approval of congress, and the other they reported to the secretary of the treasury.

This was regulated by the quantity. The act of 1822 required them to *decide* claims under one thousand acres, and *report* all over that quantity. The act of 1823 increased the quantity, *in certain cases*, to three thousand five hundred acres. These specified cases were such as where the owners were in the actual possession and occupation of the land at the date of the treaty. It was intended to give a preference to actual occupants, who have always been deservedly favourites with the congress of the United States. This was a case in which the owner, Juan Percheman, was not in possession at the date of the treaty; and consequently the register and receiver could only *report*, and not *decide* his case. The report was made, and opposite the name of the claimant with a short note was written "rejected." In this state this case was presented to congress. It is evident that it was not prepared before the register and receiver. This report was made after the act of 1828. That act disposed of all claims under a league square, and referred all over that quantity to the courts for decision.

This brings us to the question of jurisdiction in this case. It is contended that the court cannot take jurisdiction of any case under a league square. That is admitted under the act of 1828. This is a very different case. The act of 1830 did not dispose of these cases. A part were referred by the first section back to the register and receiver, requiring them to report the evidence. Some were confirmed. This one was rejected without the power to reject, because it was over one thousand, and under three thousand five hundred acres, without proof of actual possession. The first section of the act of 1830 disposes of certain Spanish claims. The second, of con-

flicting Spanish and British claims. The third, of British claims. The fourth section provides that "all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the conditions, restrictions, and limitations of the act of 1828." The claim of Percheman was a "remaining claim not finally acted upon;" because I have shown it could not be finally acted upon by the register and receiver. It was one of those which the law declared should be adjudicated upon the principles of the act of 1828. It will be observed by the court, that this act says nothing about the quantity of land.

The question then arises, which must be decisive of the point of jurisdiction, do the words "adjudicated and settled upon the conditions, restrictions and limitations" of another law, confine the quantity to the amount authorized by that law? All these relate to the *quo modo* of the adjudication. The *conditions* are, that they are to file a bill, conduct their case, &c. The restrictions are, that certain evidence shall be admitted, and certain dates regarded. The *limitations*, that they shall be presented within a certain time. All these relate to the mode of conducting the cases remaining. This is too plain to require argument.

The third point relied upon by the United States is, that the land was conveyed by the grantee to F. P. Sanchez. Whether this land belongs to Percheman or Sanchez must be perfectly immaterial to the United States. If confirmed to Percheman, it operates eo instanti as a confirmation to Sanchez. The attempt to hunt up a deed conditional or absolute, is but an expedient to avoid the trial of the merits of the case, in the favourable decision of which the United States, as a just government, ought to feel as much solicitude as in the performance of the most sacred national obligation. These pleas in abatement and technical niceties, may serve to retard the country, impoverish individuals, promote litigation, and embarrass public justice, at the expense of individual rights and public faith. They never can receive the sanction or countenance of this court. If the petition had been filed in the name of Sanchez, and the astuteness of the government agents could have discovered the point; we should have been thrown out of

court, because possession is necessary to give validity to a deed, and because the *seal* is to the name of the attorney, and not to that of the grantee. Such a deed conveys no title, and might have been excluded. The record shows, however, that the contract was to be void unless the title was confirmed. The act of congress for 1823, dispenses with the deraignment of title; and this case is to be decided not only according to "the treaty," but the "proceedings under the same." That act, being one of the proceedings under the treaty, dispenses with the production of deeds from the grantee; and sub-proprietors have a right to file their petition in the name of the original grantee.

The last point made by the attorney-general was, that the governor had no right to grant. This question has been raised in every Spanish case.

Such a point could not have been expected, in the face of the royal order commanding him to grant to the individual in question by name. This question was settled at the last term; and although an attempt has been made to reverse that decision by a bill in congress, the judiciary committee put the seal upon it by a unanimous rejection. Upon the subject of the powers of Spanish governments, the court is furnished with translations from Soloozano's Politica Indiana. This author is one of the most celebrated of the Spanish commentators. His authority was considered unquestionable by lord Ellenborough in the court of king's bench, in the trial of The King v. Picton, governor of Trinidad, 3 State Trials.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This is an appeal from a decree pronounced by the judge of the superior court for the district of East Florida, confirming the title of the appellee to two thousand acres of land lying in that territory, which he claimed by virtue of a grant from the Spanish governor, made in December 1815. The title laid before the district court by the petitioner, consists of a petition presented by himself to the governor of East Florida, praying for a grant of two thousand acres of land in the place called Ockliwaha, situated on the margins of St John's river; which

he prays for in pursuance of the royal order of the 29th of March 1815, granting lands to the military who were in St Augustine during the invasion in the years 1812 and 1813; to which the following grant is attached.

St Augustine of Florida, 12th of December 1815. Whereas this officer, the party interested, by the two certificates inclosed, and which will be returned to him for the purposes which may be convenient to him, has proved the services which he rendered in the defence of this province, and in consideration also of what is provided in the royal order of the 29th of March last past, which he cites, I do grant him the two thousand acres of land which he solicits, in absolute property, in the indicated place, to which effect let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form.

ESTRADA.

In a copy of the grant, certified by Thomas de Aguilar, secretary of his majesty's government, the words "which documents will at all events serve him as a title in form," are employed instead of the words "in order that it may be to him in all events an equivalent of a title in form."

The petitioner also filed his petition to the governor for an order of survey dated the 31st of December 1815, which was granted on the same day; and a certificate of Robert M'Hardy, the surveyor, dated the 20th of August 1813, that the survey had been made.

The attorney of the United States for the district, in his answer to this petition, states, that on the 28th of November 1823 the petitioner sold and conveyed his right in and to the said tract of land to Francis P. Sanchez, as will appear by the deed of conveyance to which he refers; that the claim was presented by the said Francis P. Sanchez to the register and receiver, while acting as a board of commissioners to ascertain claims and titles to land in East Florida, and was finally acted upon and rejected by them, as appears by a copy of their report thereon. As the tract claimed by the petitioner contains less than three thousand five hundred acres of land, and had been rejected by the register and receiver acting as a board of com-

missioners, the attorney contended that the court had no jurisdiction of the case.

At the trial the counsel for the claimant offered in evidence a copy from the office of the keeper of public archives, of the original grant on which the claim is founded, to the receiving of which in evidence the attorney for the United States objected, alleging that the original grant itself should be procured, and its execution proved. This objection was overruled by the court, and the copy from the office of the keeper of the public archives, certified according to law, was admitted. The attorney for the United States excepted to this opinion.

It appears, from the words of the grant, that the original was not in possession of the grantee. The decree which constitutes the title, appears to be addressed to the officer of the government whose duty it was to keep the originals and to issue a copy. Its language, after granting in absolute property, is, "for the attainment of which let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events equivalent to a title in form." This copy is, in contemplation of law, an original.

It appears too from the opinion of the judge, "that by an express statute of the territory, copies are to be received in evidence." The judge added, that "where either party shall suggest that the original, in the office of the keeper of the public archives, is deemed necessary to be produced in court, on motion therefor a subpœna will be issued by order of the court to the said keeper to appear and produce the said original for examination."

The act of the 26th of May 1824, "enabling the claimants of lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," in its fourth section, makes it the duty of "the keeper of any public records who may have possession of the records and evidence of the different tribunals which have been constituted by law for the adjustment of land titles in Missouri, as held by France, upon the application of any person or persons whose claims to lands have been rejected by such tribunals or either of them, or on the application of any person interested,

or by the attorney of the United States for the district of Missouri, to furnish copies of such evidence, certified under his official signature, with the seal of office thereto annexed, if there be a seal of office."

The act of the 23d of May 1828, supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, declares in its sixth section, that certain claims to lands in Florida, which have not been decided and finally settled, "shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions and limitations prescribed by (for) the district and claimants in the state of Missouri by act of congress approved May 26th, 1824, entitled "an act enabling the claimants," &c.

The copies directed by the act of 1824 would undoubtedly have been receivable in evidence on the trial of claims to lands in Missouri. Every reason which could operate with congress for applying this rule of evidence to the courts of Missouri, operates with equal force for applying it to the courts of Florida; and a liberal construction of the act of May 23d, 1828, admits of this application.

The fourth section of the act of May 26th, 1830, "to provide for the final settlement of land claims in Florida," adopts, almost in words, the provision which has been cited from the sixth section of the act of May 23d, 1828.

Whether these acts be or be not construed to authorize the admission of the copies offered in this cause; we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence.

We are all satisfied that the opinion was perfectly correct, and that the copies ought to have been admitted.

We proceed then to examine the decree which was pronounced, confirming the title of the petitioner.

The general jurisdiction of the courts not extending to suits against the United States, the power of the superior court for the district of East Florida to act upon the claim of the petitioner Percheman, in the form in which it was presented, must be specially conferred by statute. It is conferred, if at all, by

the act of the 26th of May 1830, entitled "an act to provide for the final settlement of land claims in Florida." The fourth section of that act enacts "that all the remaining claims which have been presented according to law, *and not finally acted upon*, shall be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, as are prescribed by the act of congress approved the 23d of May 1828, entitled "an act supplementary," &c.

The claim of the petitioner, it is admitted, "had been presented according to law;" but the attorney for the United States contended, that "it had been finally acted upon." The jurisdiction of the court depends on the correctness of the allegation. In support of it, the attorney for the United States produced an extract from the books of the register and receiver acting as commissioners to ascertain claims and titles to land in East Florida, from which it appears that this claim was presented by Francis P. Sanchez, assignee of the petitioner, on which the following entry was made. "In the memorial of the claimant to this board, he speaks of a survey made by authority in 1819. If this had been produced, it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim."

Is this rejection a final action on the claim, in the sense in which those words are used in the act of the 26th of May 1830?

In pursuing this inquiry, in endeavouring to ascertain the intention of congress, it may not be improper to review the acts which have passed on the subject, in connexion with the actual situation of the persons to whom those acts relate.

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February 1819.

The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law,

would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled: The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. "The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article."

This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant

of buildings could not have been limited by the words "which are not private property," had private property been included in the cession of the territory.

This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words. "All the grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article.

The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that the grants "shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c.,"—thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government in order to give validity to titles which, according

to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed" by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.

In the case of Foster v. Elam, 2 Peters, 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

This understanding of the article, must enter into our construction of the acts of congress on the subject.

The United States had acquired a territory containing near thirty millions of acres, of which about three millions had probably been granted to individuals. The demands of the treasury, and the settlement of the territory, required that the vacant lands should be brought into the market; for which purpose the operations of the land office were to be extended into Florida. The necessity of distinguishing the vacant from the appropriated lands was obvious; and this could be effected only by adopting means to search out and ascertain pre-existing titles. This seems to have been the object of the first legislation of congress.

On the 8th of May 1822, an act was passed, "for ascertaining claims and titles to land within the territory of Florida."

The first section directs the appointment of commissioners *for the purpose of ascertaining* the claims and titles to lands within the territory of Florida, as acquired by the treaty of the 22d of February 1819.

It would seem from the title of the act, and from this declaratory section, that the object for which these commissioners were appointed, was the ascertainment of these claims and titles. That they constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles. By the act "for the establishment of a territorial government in Florida," previously passed at the same session, superior courts had been established in East and West Florida, whose jurisdiction extended to the trial of civil causes between individuals. These commissioners seem to have been appointed for the special purpose of procuring promptly for congress that information which was required for the immediate operations of the land office. In pursuance of this idea, the second section directs that all the proceedings of the commissioners, the claims admitted, with those rejected, and the reason of their admission and rejection, be recorded in a well bound book, and forwarded to the secretary of the treasury to be submitted to congress. To this desire for immediate information we must ascribe the short duration of the board. Their session for East Florida was to terminate on the last of June in the succeeding year; but any claims not filed previous to the 31st of May in that year to be void, and of none effect.

These provisions show the solicitude of congress to obtain, with the utmost celerity, that information which ought to be preliminary to the sale of the public lands. The provision, that claims not filed with the commissioners previous to the 30th of June 1823 should be void, can mean only that they should be held so by the commissioners, and not allowed by them. Their power should not extend to claims filed afterwards. It is impossible to suppose that congress intended to forfeit real titles not exhibited to their commissioners within so short a period.

The principal object of this act is further illustrated by the sixth section, which directed the appointment of a surveyor who should survey the country; taking care to have surveyed and marked, and laid down upon a general plan to be kept in his office, the metes and bounds of the claims admitted.

The fourth section might seem in its language to invest the commissioners with judicial powers, and to enable them to de-

cide as a court in the first instance, for or against the title in cases brought before them; and to make such decision final if approved by congress. It directs that the "said commissioners shall proceed to examine and determine on the validity of said patents," &c. If, however, the preceding part of the section to which this clause refers be considered, we shall find in it almost conclusive reason for the opinion that the examination and determination they were to make, had relation to the purpose of the act, to the purpose of quieting speedily those whose titles were free from objection, and procuring that information which was necessary for the safe operation of the land office; not for the ultimate decision, which, if adverse, should bind the proprietor. The part of the section describing the claims into the validity of which the commissioners were to examine, and on which they were to determine, enacts, that every person, &c. claiming title to lands under any patent, &c. "which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, &c."

Is it possible that congress could design to submit the validity of titles, which were "valid under the Spanish government, or by the law of nations," to the determination of these commissioners?

It was necessary to ascertain these claims, and to ascertain their location, not to decide finally upon them. The powers to be exercised by the commissioners under these words, ought therefore to be limited to the object and purpose of the act.

The fifth section, in its terms, enables them only to examine into and confirm the claims before them. They were authorized to confirm those claims only which did not exceed one thousand acres.

From this review of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term "rejected," or in any other manner, is not to be considered as a final judicial

decision on the claim, binding the title of the party; but as a rejection for the purposes of the act.

This idea is strongly supported by a consideration of the manner in which the commissioners proceeded, and by an examination of the proceedings themselves, as exhibited in the reports to congress.

The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties: but to have pursued their inquiries like a board of commissioners, making those preliminary inquiries which would enable the government to open its land office; whose inquiries would enable the government to ascertain the great bulk of titles which were to be confirmed, not to decide ultimately on the titles which those who had become American citizens legally possessed.

On the 3d of March 1823, congress passed a supplementary act, which also provided for the survey and disposal of the public lands in East Florida. It authorizes the appointment of a separate board of commissioners for East Florida, and empowers the commissioners to continue their sessions until the second Monday in the succeeding February, when they were to return their proceedings to the secretary of the treasury.

This act dispenses with the necessity of deducing title from the original grantee, and authorizes the commissioners to decide on the validity of all claims derived from the Spanish government *in favour* of actual settlers, where the quantity claimed does not exceed three thousand five hundred acres. The act "to extend the time for the settlement of private land claims in the territory of Florida," passed on the 28th of February 1824, enacts that no person shall be deemed an actual settler, "unless such person, or those under whom he claims title, shall have been in the cultivation or occupation of the land, at and before the period of the cession."

On the 8th of February 1827, congress passed an act extending the time for receiving private land claims in Florida, and directing them to be filed on or before the 1st day of the following November, with the register and receiver of the dis-

trict; "whose duty it shall be to report the same with their decision thereon," on or before the 1st day of January 1828, to be laid before congress at the next session.

These acts are not understood to vary the powers and duties of the tribunals authorized to settle and confirm these private land claims.

On the 23d of May 1828 an act passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida.

This act continues the power of the register and receiver till the first Monday in the following December, when they are to make a final report; after which it shall not be lawful for any of the claimants to exhibit any further evidence in support of their claims.

The sixth section of this act transfers to the court all claims "which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged," and declares that they "shall be received and adjudicated by the judge of the district court in which the land lies, upon the petition of the claimant, according to the forms," &c. "prescribed," &c. by act of congress approved May 26th, 1824, entitled "an act enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas to institute proceedings," &c. A proviso excepts from the jurisdiction of the court any claim annulled by the treaty or decree of ratification by the king of Spain, or any claim not presented to the commissioners or register and receiver.

The thirteenth section enacts that the decrees which may be rendered by the district or supreme court "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

In all the acts passed upon this subject previous to that of May 1830, the decisions of the commissioners, or of the register and receiver acting as commissioners, have been confirmed. Whether these acts affirm those decisions by which claims are rejected, as well as those by which they are recommended for confirmation, admits of some doubt: whether a rejection,

amounts to more than a refusal to recommend for confirmation, may be a subject for serious inquiry: however this may be, we think it can admit of no doubt that the decision of the commissioners was conclusive in no case until confirmed by an act of congress. The language of these acts, and among others that of the act of 1828, would indicate that the mind of congress was directed solely to the confirmation of claims, not to their annulment. The decision of this question is not necessary to this case. The claim of the petitioner was not contained in any one of the reports which have been stated.

On the 26th of May 1830, congress passed "an act to provide for the final settlement of land claims in Florida." This act contains the action of congress on the report of the 14th of January 1830, which contains the rejection of the claim in question. The first section confirms all the claims and titles to land filed before the register and receiver of the land office under one league square, which have been decided and recommended for confirmation. The second section confirms all the conflicting Spanish claims, recommended for confirmation as valid titles.

The third confirms certain claims derived from the former British government, and which have been recommended for confirmation.

The fourth enacts "that all remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions," &c.

It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress on the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed on those which were rejected. They were, of consequence, expressly submitted to the court.

The decision of the register and receiver could not be conclusive for another reason. Their power to decide did not extend to claims exceeding one thousand acres, unless the claimant was an actual settler: and it is not pretended that either the petitioner, or Francisco de Sanchez, his assignee,

was a settler, as described in the third section of the act of 1824.

The rejection of this claim, then, by the register and receiver did not withdraw it from the jurisdiction of the court, nor constitute any bar to a judgment on the case according to its merits.

An objection not noticed in the decree of the territorial court, has been urged by the attorney-general; and is entitled to serious consideration. The governor, it is said, was empowered by the royal order on which the grant professes to be founded, to allow to each person the quantity of land established by regulation in the province, agreeably to the number of persons composing each family.

The presumption arising from the grant itself of a right to make it, is not directly controverted; but the attorney insists that the documents themselves prove that the governor has exceeded his authority.

Papers translated from a foreign language, respecting the transactions of foreign officers, with whose powers and authorities we are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the court; should be carefully examined before we pronounce that an officer, holding a high place of trust and confidence, has exceeded his authority.

The objection rests on the assumption that the grant to the petitioner is founded entirely on the allowance made in the royal order of the 29th of March 1815, at the request of the governor of East Florida; and the petition to the governor undoubtedly affords strong ground for this assumption; but we are far from thinking it conclusive. The petitioner says, "that, in virtue of the bounty in lands which, pursuant to his royal order of the 29th of March of the present year, the king grants to the military who were of this place in the time of the invasion which took place in the years 1812 and 1813, and your petitioner considering himself as being comprehended in the said sovereign resolution, as it is proved by the annexed certificates of his lordship brigadier Don Sebastian Kindelan, and by that which your lordship thought proper to provide herewith, which certificates express the merits and services

rendered by your petitioner at the time of the siege, in consequence of which said bounties were granted to those who deserved them;" "therefore he most respectfully supplicates your lordship to grant him two thousand acres of land in the place," &c. The governor granted the two thousand acres of land for which the petitioner prays.

The attorney contends that the royal order of the 29th of March 1815, empowered the governor to grant so much land only, as, according to the established rules, was allowed to each settler. This did not exceed one hundred acres to the head of a family, and a smaller portion for each member of it.

The extraordinary facts that an application for two thousand acres should be founded on an express power to grant only one hundred; that this application should be accompanied by no explanation whatever; and that the grant should be made without hesitation, as an ordinary exercise of legitimate authority, are circumstances well calculated to excite some doubt whether the real character of the transaction is understood, and to suggest the propriety of further examination.

The royal order is founded on a letter from governor Kindelan to the captain-general of Cuba, in which he recommends the militia as worthy the gifts to which the supreme governor may think them entitled; "taking the liberty of recommending the granting of some, which may be as follows: to each officer who has been in actual service in said militia, a royal commission for each grade he may obtain as provincial, and to the soldiers a certain quantity of land as established by regulation in this province, agreeably to the number of persons composing each family, and which gifts can also be exclusively made to the married officers and soldiers of the said third battalion of Cuba."

The words "and which gifts," &c. in the concluding part of the sentence, would seem to refer to that part which asks lands for the soldiers of the militia; and yet it is unusual in land bounties for military service, to bestow the same quantity on the officers as on the soldiers.

But be this as it may, the application of governor Kindelan is confined to the privates who served in the militia, and to the married officers and soldiers of the third battalion of Cuba.

The petitioner was in neither of these corps. He was an ensign of the corps of dragoons.

The royal order alluded to, is contained in a letter of the 29th of March 1815, from the minister of the Indies; who, after stating the application in favour of the militia, and the third regiment of Cuba, adds, "at the same time that his majesty approves said gifts, he desires that your excellency will inform him as to the reward which the commandant of the third battalion of Cuba, Don Juan José de Estrada, who acted as governor pro tem. at the commencement of the rebellion, the officers of artillery, Don Ignacia Salus, Don Manuel Paulin, and of dragoons, Don Juan Percheman, are entitled to as mentioned by the governor in his official letter. By royal order I communicate the same to his excellency for your information and compliance therewith, enclosing the royal commissions of local militia, according to the note forwarded bv your excellency."

The governor adds, "I forward you a copy of the same, enclosing also the documents above mentioned, that you may give their correspondent direction, with the intention, by the first opportunity of informing his majesty of what I consider just as to the remuneration beforé mentioned."

It appears then that the part of the royal order which is supposed to limit this power of the governor to grants of one hundred acres does not comprehend the petitioner; that he is mentioned in that order as a person entitled to the royal bounty, the extent of which is not fixed, and respecting which the governor intended to inform his majesty.

The royal order then is referred to in the petition, as showing the favourable intentions of the crown towards the petitioner; not as ascertaining limits applying to him, which the governor could not transcend.

The petition also refers to certificates granted by general Kindelan, and by the governor himself, expressing his merits and services during the siege. These could have no influence if the amount of the grant was fixed.

In his grant annexed to the petition, the governor says, "whereas this officer, the party interested by the two certificates enclosed, *has proved the services which he rendered in defence of*

this province, and in consideration also of what is provided in the royal order of the 29th of March last past, which he cites, I do grant him," &c.

Military service, then, is the foundation of the grant, and the royal order is referred to only as showing that the favourable attention of the king had been directed to the petitioner.

The record furnishes other reasons for the opinion that the power of the governor was not so limited in this case, as is supposed by the attorney for the United States.

The objection does not appear to have been made in the territorial court, where the subject must have been understood. It was neither raised by the attorney for the United States, nor noticed by the court.

The register and receiver, before whom the claim was laid by Sanchez, the assignee of the present petitioner, did not reject it because the governor had exceeded his power in making it, but because the survey was not exhibited. "If this" (the survey), say the register and receiver, "had been produced, it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim."

It may be added that other claims under the same royal order for the same quantity of land, have been admitted by the receiver and register; and have been confirmed by congress.

We do not think the testimony proves that the governor has transcended his power.

The court does not enter into the inquiry, whether the title has been conveyed to Sanchez or remains in Percheman. That is a question in which the United States can feel no interest, and which is not to be decided in this cause. It was very truly observed by the territorial court, that this objection "is founded altogether on a suggestion of *a private adverse claim*:" but adverse claims, under the law giving jurisdiction to the court, are not to be decided or investigated. The point has not been made in this court.

The decree is affirmed.

JOHN MINOR, PLAINTIFF IN ERROR v. SHURBAL TILLOTSON.

What will be deemed sufficient evidence of diligent and sufficient search for a lost or mislaid original paper, to permit a copy to be read as secondary evidence.

The rules of evidence are adopted for practical purposes in the administration of justice. And although it is laid down in the books as a general rule, that the best evidence the nature of the case will admit of, must be given; yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed is governed, in some measure, by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original.

ERROR to the district court of the eastern district of Louisiana.

This case came before the court, and was argued by Mr Clay, for the plaintiff in error; and by Mr Webster, for the defendant.

The only point decided by the court, with the facts which presented it for consideration, are fully stated in the opinion of the court. Other questions in the case, in relation to the admission of testimony, were argued by the counsel for the parties; but the court considered them so imperfectly stated, as to require that another trial of the cause should take place in the court below.

Mr Justice THOMPSON delivered the opinion of the Court.

On the trial of this cause, in the district court of the United States for the eastern district of Louisiana, a bill of exceptions was taken to the ruling of the court in rejecting certain evidence offered by the plaintiff in support of the title set up by him, and the case is brought here by writ of error.

The bill of exceptions states that the plaintiff, having set up title to the premises in dispute by virtue of a sale for general

Wade Hampton, dated the 5th of April 1819, then offered in evidence another paper purporting to be a copy of the grant, under which said Hampton claimed, which copy had been duly presented and registered by the land commissioners of this district, in the year 1806, having first proved that many of the ordinances of the Spanish governors of Louisiana had been deposited in the notarial office of Pedro Pedescloux, the notary, who certified the said paper under his hand and notarial seal, and who is now dead; and also having first proved that the original grant was once in the possession of general Wade Hampton, but that he had, by his attorney, applied to said Wade Hampton for it, who gave him a bundle of papers, saying, they were all the titles of his Houmas lands in his possession, but which bundle did not contain the original of the paper sought after: the plaintiff also offered in evidence the translation of said document, published by congress in the book called the Land Laws of the United States, pp. 954, 955, 956, published in the year 1828. These papers were objected to on the ground that they were not the best evidence, and that due diligence had not been used to procure the originals. And the court sustained the objection.

The document offered and rejected by the court, is to be considered as secondary evidence; and there can be no doubt that the plaintiff was bound to account for the non-production of the original. This is a document which the law does not presume to be in the possession of the plaintiff; it is the grant under which Wade Hampton claimed; a small part of which only was in question in this suit. The presumption of law therefore is, that the original deed was in the possession of Wade Hampton, and the plaintiff could not be bound to search for it elsewhere; there being no law in Louisiana requiring deeds to be recorded. And it was proved, as matter of fact, that it was once in his possession; at what time, however, is not stated; and the question is, whether such search was made for it as to justify the admission of secondary evidence. The rules of evidence are adopted for practical purposes in the administration of justice; and although it is laid down in the books as a general rule, that the best evidence the nature of the case will admit of, must be given; yet it is not under-

stood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed in a case like the present, is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld; a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. Has that been shown in this case? The exception states, that it was *proved* to have been in the possession of Wade Hampton, and that on application to him, by the plaintiff's attorney, for it, he gave him a bundle of papers, saying, they were all the titles to his Houmas lands (the premises in question being a part of that tract); but which bundle, on examination, did not contain the original deed in question. There was no other place to which the law pointed where search could be made; and nothing more could be required, unless it was necessary to have the oath of Wade Hampton that the deed was not in his possession. But this we do not think, under the circumstances of this case, was necessary. There do not appear any grounds for supposing the deed was designedly withheld; and the circumstances under which the search was made, were equivalent to the witness's having had free access to all Wade Hampton's papers, and proving that the deed could not be found among them. The examination was made by the witness under all the advantages and prospect of finding the deed that could have been afforded to Hampton himself. He was, for this purpose, in the possession of all his papers; and not finding it, the inference was very strong that it was lost. And the antiquity of the deed, being dated in the year 1777, rendered its loss the more probable.

The case of Caufman v. Congregation of Cedar Spring, 6 Binney, 59, decided in the supreme court of Pennsylvania, goes very fully to establish that it was not necessary to have the testimony of Wade Hampton, under the circumstances of this case. In that case a written agreement was placed in the hands of a common friend, who, upon his removal to another place, had put the paper into the hands of his father, who died. After proofs of these facts, a witness swore that,

after the father's death, he, together with the son-in-law, *to whom all his papers came*, made diligent search among the father's papers, but could not find the writing. It was held that this was sufficient proof of the loss to lay the foundation for proving the contents of the paper, *without the oath* of the son-in-law himself, as to the search and not finding the paper.

We think the proof of the loss of the original deed was sufficient to let in the secondary evidence. We forbear, however, expressing any opinion upon the legal effect and operation of that deed.

The judgment of the court below must be reversed, and the cause sent back with directions to award a venire de novo.

There were several other exceptions taken to the ruling of the court, in relation to the admission of testimony, which we do not notice. They are so imperfectly stated, that it is difficult to understand what the real point of objection is; and no opinion can be expressed that will aid the court below on another trial.

Judgment reversed.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said district court with directions to award a venire facias de novo.

WILLIAM S. NICHOLS, PLAINTIFF IN ERROR v. SAMUEL J. FEARSON ET AL.

A promissory note, payable at a future day, given for a bona fide business transaction, and which note was not made for the purpose of raising money in the market, was sold by the drawee and indorser for a sum so much less on its face, as exhibited a discount beyond the legal rate of interest, no stipulation having been made against the liability of the indorser; is not per se an usurious contract between the indorser and indorsee, and an action can be maintained upon the note against the indorser who sold the same, by the purchaser.

The courts of New York have adjudicated, that whenever the note or bill in its inception was a real transaction, so that the payee or promissee might at maturity maintain a suit upon it, a transfer by indorsement, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal negotiation.

There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred: the first is, that to constitute usury, there must be a loan in contemplation by the parties; and the second, that a contract which in its inception is unaffected by usury, can never be invalidated by any subsequent usurious transaction.

IN error to the circuit court of the United States for the district of Columbia, in the county of Washington.

The plaintiff in error instituted a suit on a promissory note dated at Georgetown, October 22d, 1821, for the sum of one hundred and one dollars, payable to the order of S. and J. Fearson, the defendants, and by them indorsed. The evidence in the case showed, that on the 26th of October 1821 the defendants came into the store of the plaintiff with the note, and told the plaintiff they had obtained the note from the drawer for goods they had sold him at their store, and asked the plaintiff what he would give for it: the plaintiff said he would give ninety-seven dollars for it, which the defendants agreed to take; and thereupon the plaintiff received the note, which was indorsed by the defendants before it was brought to the store, and ninety-seven dollars were paid to the defendants for it.

When the note became due, and being unpaid by the drawer, the defendants promised to pay it.

Upon this evidence the counsel for the defendants prayed the court to instruct the jury:

"That if they believe from the said evidence that the plaintiff received the note upon which this suit is brought of defendants, with their indorsement upon it, and without an understanding that the defendants were not to be responsible on said indorsement, and that the plaintiff paid or agreed to pay therefor only the sum of ninety-seven dollars, the transaction is usurious, and the plaintiff is not entitled to recover; which the court gave as prayed. To which the plaintiff, by his counsel, excepted, and then prayed the court to instruct the jury:

"If they should believe, from the evidence aforesaid, that the defendants, having the note in question, and wishing to part with it in order to avoid suing the drawer, and not having occasion or desire for a loan of money, offered to sell it to the plaintiff, and that the plaintiff having some accounts with the drawer, against which he expected to be able to set off the said note, and not with any other design, agreed to buy it, and did buy it, for ninety-seven dollars; and that no loan for usurious interest, nor any loan, nor any evasion of the laws against usury was in the contemplation of either of the said parties, then plaintiff is entitled to recover;" which the court refused.

The plaintiff's counsel prayed the court to instruct the jury:

"If they believe, from the evidence aforesaid, that this note was sold, and not received by plaintiff, by way of discount or loan, plaintiff is entitled to recover;" which also was refused.

The plaintiff excepted to the instructions of the court given to the jury on the prayers of the defendants; and also to the refusal of the court to give the instruction asked by them.

The jury having found for the defendants, this writ of error was prosecuted to reverse the judgment of the court on the same.

The case was argued by Mr Key for the plaintiff in error; and by Mr Coxe for the defendants.

Mr Key, for the plaintiff in error, contended, that the ques

tion of usury was one depending entirely on the transaction out of which it was said to arise. If a loan was the object of the dealing between the parties, it might be usury; but if it was only the sale of a note already made, it was not so.

Why should not a person who has claims upon him purchase a note to set it off against such demands? Why should not the holder of a note sell it for what he may consider it worth? The reason that such a sale of a note is said to be usurious is, that the indorser who disposes of it is liable; and yet the sale of a bill of exchange, the payment of which is guarantied by the seller, is valid. Cited, Scott v. Lloyd, 4 Peters, 205; 1 Starkie, 385; 2 Barn. & Ald. 588; 2 Mumford, 36; 8 Cowen, 369; 3 Bos. & Pul. 154; 1 Call, 66, 70; 1 Dall. 217; 2 Strange, 1243.

Mr Coxe, for the defendants in error, argued, that the sale of the note by the defendants, they being indorsers upon it, was a borrowing of money on usury. While it is admitted that promissory notes may be sold for less sums than their nominal amount, and with larger deductions than the regular discount; yet in no such cases does the seller continue liable for the repayment of the money by indorsing the note. The indorsement of the note made it a direct contract between the plaintiff and the defendant for the loan of money, on a usurious consideration. There was nothing therefore to leave to the jury; the fact was admitted, and the law was properly applied to it by the court. Cited, 13 Johns. 52; 15 Johns. 44; 2 Johns. Cases, 60; 15 Mass. 96; 2 Connecticut Reports, 175.

Mr Justice JOHNSON delivered the opinion of the Court.

This was an action by the indorsee against the indorser of a promissory note, in which the plaintiff here was plaintiff in the court below. It comes up upon exceptions taken to certain instructions given at the instance of the defendant, and to the refusal of other instructions prayed for by the plaintiff.

On the motion of the defendants, the court instructed the jury, "that if they believed, from the evidence, that the plaintiff received the note in question from the defendants, with their indorsement upon it, and without any understanding that the defendants were not to be responsible upon their indorse-

ment," at a discount beyond the legal rate of interest, then the transaction was usurious, and he could not recover.

The plaintiff then moved the court to instruct the jury to this effect: "that if they believed the evidence made out a case in which there was no loan contemplated, nor any evasion of the laws against usury, but simply a sale of the note in question, then the transaction was not usurious, and the plaintiff was entitled to recover;" which instruction the court refused.

The case makes out the note to have been a bona fide business transaction, not suspected of usury in its origin, or made up for the purpose of raising money in the market; and the decision of the court below of course affirms this proposition, "that in the sale of such a note, for a sum so much less than that on its face, as will exhibit a discount beyond the legal rate of interest, the guarantee or indorsement of the note, without a stipulation against the indorser's liability, makes out a case of usury; that it is, per se, an usurious contract between the indorsee and indorser; and no action can be maintained upon it against the indorser. And since the rule is universal, that there can be no usury where there is no loan; it follows, that their decision implies the affirmance of the proposition that such a guarantee or indorsement necessarily implies a loan.

It is necessary to bear in mind that we are not now called upon to consider a case occurring upon the transfer of a note which is, in its origin, a mere nominal contract, one on which, as the test is very properly established in the New York courts, no course of action arose between the original parties. 15 John. 44, 55. The present is a case of greater difficulty, for the principle affirmed in the decision under review, operates indirectly upon a contract not affected by usury; since by leaving the possession of the note in the indorsee who has no cause of action, and the cause of action, if anywhere, in the indorser, who has parted with the possession of the note; it virtually discharges the promissor from liability, although his contract, in its inception, may have been wholly unimpeachable. Yet the rule of law is every where acknowledged, that a contract, free from usury in its inception, shall not be invalidated by any subsequent usurious transactions upon it.

It will hardly be contended that, although the indorsement gave no cause of action against the indorser, yet it did operate to give a right of action against the maker of the note. The statute declares an usurious contract to be invalid to all intents and purposes whatever; a valid indorsement is a contract as well of transfer as of provisional liability; and if invalid to the one purpose, it must be equally so to the other.

The courts of New York have got over these difficulties by adjudicating, that whenever the note or bill, in its inception, was a real transaction, so that the payee or promissor might at maturity maintain a suit upon it, a transfer by indorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal negotiation. Such is the result of the decisions in Jones v. Haik, 2 Johns. Cases, 60; Wilkie v. Roosevelt, 3 John. Cases, 66; and Munn v. The Commission Company, 15 John. Rep. 44.

It has been argued that the Massachusetts courts maintain the contrary doctrine. But the cases cited will not be found sufficient to bear out the argument. The case of Churchill v. Suter, 4 Mass. 156, was the case of a nominal contract, a note made to be sold in the market, as is admitted in the case stated; the point of usury was not argued; and the opinion expressed by the learned judge, was, at best, but an obiter dictum. However, let that opinion be confined to the res subjecta, and there can be no reason for controverting it in this case. It was the case of a nominal sale, a loan with the disguise of a sale thrown over it.

The case of Bridge et al. v. Hubbard, 15 Mass. 96, was one of a different character, and decided in conformity with another class of cases. It was the case of the substitution of a new contract for a note given for usurious interest due upon previous transactions. The note passed into the hands of innocent indorsees, and the question was, whether it was affected with the taint of the original usury, or only with the want of consideration. And the majority of the court held it to be a security for a loan of money obtained upon usury, and therefore

void in the hands of the present holders. This, of course, is not an adjudication in point.

The case of Lloyd v. Keach, Connecticut Rep. 175, cited from the adjudications of Connecticut, is in point: but it is an authority against the decision under review. The note was given in the course of business; and in a suit brought upon it by the indorsee against the drawer, the inferior court decided that the sale of such a note by the indorser on a discount exceeding the legal rate of interest, was rendered usurious by his indorsement and guarantee, and that the plea of usury was a good bar to a suit instituted against the drawer. But, on an appeal to the supreme court of errors, although there was a considerable diversity of opinion among the judges, a new trial was granted upon the ground that such a transaction was not, per se, usurious; but that its validity must depend upon the bona fides of the transaction, as being a pure unaffected sale or merely a colour for a loan.

Upon a subject of such general mercantile interest, we must dispose of the question according to our own best judgment of the law. And it becomes necessary first to review some of our own decisions which have a bearing upon it.

The first was the case of Levy v. Gadsby, which was an action by indorsee against indorser, upon a note which would seem to have originated in a real transaction, and the defence was usury. But the distinction between that case and the present is, that the defence was not set up in that case upon any interest or discount taken for the transfer of the note, but upon an usurious negotiation for a loan or forbearance with reference to a pre-existing debt, in consideration of which, Gadsby's note was indorsed to the plaintiff; and thus came within the description of "an assurance for forbearance," which is made void by the statute, as well as the contract secured (3 Cr. 180, 1 Condensed Reports, 486); and the usury there was proved, not inferred from the guarantee by indorsement.

The case of Gaither v. The Farmers and Mechanics Bank, 1 Peters, 37, was one precisely of the same character with that of Levy v. Gadsby, except that the suit was instituted by the indorsee against the *drawer*; the cause was decided upon the

invalidity of the indorsement to transfer the right of action to that indorsee, not to any other holder, the plaintiff being the party to the usury. An usurious loan had been negotiated, and Gaither's note to Corcoran, the borrower on usury, indorsed in blank by Corcoran, and left with the plaintiff to collect, in payment of the money borrowed. It was therefore a clear case of an *assurance* given for money borrowed on usury; and in no way could a court permit the borrower to avail himself of the indorsement without violating the statute.

We recollect no other case in which this court has been called upon to consider the effect of usury upon the contracts of parties to negotiable paper. We are therefore uncommitted upon the question now before us; and free to decide it, as well upon reason and principle, as upon what appears to us to be the weight of authority.

There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.

It is true with regard to the first of these canons, that there are cases which necessarily import a loan; and no disguise, no affectation of sale or barter can divest them of that character: such, for instance, as a man's selling his own bond or note, executed, say in blank: and when these cases occur, the law puts the stigma upon them without further inquiry. The instrument having had no virtual existence until the loan or sale was negotiated, could in no wise be regarded as a transfer of property. But he who sells his lands or stock, and takes a note in payment, holds in his hands the representative of property; an entity to which the improvements of society have attached nearly all the rights and characteristics, in equity at least, which were the acknowledged attributes of the property for which it was received. A promise to return the money borrowed, is indeed one among the ordinary indications of a loan; and upon the idea that the contract of an indorser could not be distinguished from a general engagement to repay, have the

decisions in the Connecticut case and in the court below, in the case at bar, been rendered. But the grounds of distinction are material, for the contract between indorser and indorsee is at best but a conditional or provisional contract; the indorsement of a business note produces a real transfer of interest, and the indorsement may well be regarded in the light of a guarantee against the insolvency of the promissor. In the case of an assignment of a bond, with a guarantee against insolvency; which every assignment in Virginia and Kentucky imports; it has been adjudged in both those states that usury does not avoid the effect of the assignment. That the transfer of the right of action on the bond is complete; and if valid for one purpose, it is presumed it must be so to every one. Littell v. Herd, Hardin, 81; Hansborough v. Baylor, 2 Munf. 36.

These observations are made to show that the indorsement of this note did not necessarily import a loan. But we are not to be understood as intimating, that if in a treaty for, or conclusion of *a loan*, the indorsement be expressly stipulated for as security for repayment, the contract being usurious may not invalidate the indorsement under the character of a security or assurance. Such was the decision in Gaither's case in this court; and these remarks only go to show that an indorsement, without a stipulation against ultimate liability, does not necessarily imply a case of usury.

And in this we are sustained by the argument ab inconvenienti, or ducitur in absurdum, which would result from the contrary doctrine, if considered with relation to the second canon or general rule respecting usury, as before laid down, to wit:

That a contract free from usurious taint in its inception, is not to be invalidated by any subsequent usurious transaction; since, as has been shown, by converting a sale on a discount into a loan on usury, and thus rendering null and void the act of indorsing it, a contract wholly innocent in its origin, and binding and valid upon every legal principle, is rendered at least valueless in the hands of the otherwise legal holder: and a party to whom the provisions of the act against usury could never have been intended to extend, would be discharged of a debt which he justly owes to some one.

Such inconsistencies are not to be lightly incurred; it is enough to submit to them when they become unavoidable: but it is easy to assign other and adequate motives for selling a note and then indorsing it, without imputing to the transaction the negotiation of a loan; and it is enough if the imputation be not unavoidable. The acts against usury were intended to protect the needy; but the holder of a note may be wealthy, may be the lender, not the borrower of money, and yet find an adequate motive both for selling a note and guarantying it. Suppose the debtor absconds, or removes to the Arkansas or the Oregon: the very wealth of the holder may make it no object to follow him or prosecute a suit against him; his freedom from necessity may be the holder's motive for parting with the note to another at a moderate sacrifice; his indorsing it will diminish that sacrifice; and, although removing, the debtor may be wealthy, and the inducement for the indorsement may be the conviction that the debt is safe,—that he will *never* have to repay what he has received. There could be inferred no treaty for a loan from such a transaction, nor any device to evade the statute. It is a plain contract of bargain and sale, with a warranty of the soundness of the property.

We have not had leisure fully to explore the decisions of the states on the question, but, as far as we have gone, the great weight of authority is certainly in favour of the validity of the contract under review.

The courts of Kentucky have recognized the validity of such a transfer in a case of admitted usury between the assignor and assignee of a bond. Littell v. Herd, Hardin, 82. The courts of Virginia have given validity both to the assignment of a bond and the indorsement of a note, expressly created for sale, and sold at an usurious discount, where there was no proof of a negotiation for a loan. 2 Mumf. 36, and 5 Rand. 33. Those of Maryland also have lent their sanction to the doctrine in the case of Kenner v. Herd, 2 Hen. & Mumf.; and in South Carolina such has long been the established doctrine. 1 Bay. 456; 3 M'Cord, 365.

On the question whether the plaintiff may recover the whole amount of the note, or only according to the value of the con-

sideration paid; it will be observed, we are not called upon to express an opinion.

Upon the whole, we are of opinion, that upon both reason and authority the law is in favour of the plaintiff; and that the court below erred, both in the instructions given for the defendants, and in refusing those prayed by the plaintiff.

Judgment reversed, and a venire de novo awarded.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: on consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed and annulled, and that this cause be, and the same is hereby remanded to the said circuit court with directions to award a venire facias de novo.

JAMES S. DOUGLASS AND OTHERS, PLAINTIFFS IN ERROR V. REYNOLDS, BYRNE AND COMPANY, DEFENDANTS IN ERROR.

Action upon the following letter of guarantee, written by the defendants and delivered to the plaintiffs:

"*Port Gibson, December* 1827.

"Messrs REYNOLDS, BYRNE & Co.

"Gentlemen: Our friend, Mr Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

"Your obedient servants,

"JAMES S. DOUGLASS.
"JOHN G. SINGLETON.
"THOMAS GOING."

One count in the declaration was for money lent, and money had and received. Held, that upon a collateral undertaking of this sort, no such suit is maintainable.

The depositions of several witnesses, clerks in the counting-house of the plaintiffs, were admitted on the trial of the cause, in which the witnesses stated that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by C. H. to them for advances from time to time, to the amount of eight thousand dollars; that advances were made, and moneys paid by them on account of C. H. from the time of receiving the said letter, predicated on the letter always protecting the plaintiffs to the amount of eight thousand dollars; and that it was considered in the counting-house as a continuing letter of credit, and so acted upon by the plaintiffs. Held, that this evidence was rightly admitted to establish that credit had been given to C. H. on the faith of it, from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion that no such advances, acceptances, or indorsements had been made upon the credit of it. The evidence was not open to the objection, that it was an attempt by parol evidence to explain a written contract.

Nothing can be clearer, upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it; the party is not entitled to recover for any debts due by him from the debtor in whose favour it was given, which have been incurred subsequently to the guarantee, and without any reference to it.

The guarantee given by the defendants covered successive advances, acceptances and indorsements made by the plaintiffs, to the amount of eight

thousand dollars at any subsequent times, toties quoties, whenever the antecedent transactions were discharged. It was a continuing guarantee.

Every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction, beyond the fair import of its terms.

The cases of Russell v. Clarke's Executors, 7 Cranch's Rep. 69. 2 Peters's Condensed Reports, 417; and Drummond v. Prestman, 12 Wheat. Rep. 515, cited.

A party giving a letter of guarantee has a right to know whether it is accepted and whether the person to whom it is addressed, means to give credit on the footing of it, or not. It may be most material not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favour it is given. Especially it is important in the case of a continuing guarantee; since it may guide his judgment in recalling or suspending it.

If this had been the case of a guarantee limited to a single transaction, it would have been the duty of the plaintiffs to have given notice of the advances, acceptances or indorsements made under it, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplate a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances, and indorsements which would be renewed and discharged from time to time; there is no general principle upon which to rest, that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions under the guarantee were closed, notice of the amount for which the guarantors were responsible, should, within a reasonable time afterwards, be communicated to them.

A demand of payment of the sum advanced under the guarantee, should be made of the person to whom the same was made, and in case of non-payment by him, notice of such demand and non-payment should have been given in a reasonable time to the guarantors, otherwise they would be discharged from the guarantee. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a casus fœderis. The creditors are not bound to institute legal proceedings against the debtor, but they are bound to use reasonable diligence to make demand and to give notice of non-payment.

An account was stated between the plaintiffs and Chester Haring, showing an apparent balance against Haring of twenty-two thousand five hundred and seventy-three dollars; and at the foot of the account the plaintiffs

gave a receipt for several promissory notes, payable at distant periods, dated on the same day with the account. The notes were drawn by C. Haring, and indorsed by Daniel Greenleaf. The receipt stated that "the notes, when discounted, the proceeds to go to the credit of this account." The notes were discounted, and the proceeds received by the plaintiffs, but, being unpaid, they were protested; notice of their non-payment was given to the indorsers, and they were afterwards taken up by the plaintiffs as indorsers thereof. Held: if the plaintiffs below, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonour by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged.

IN error to the district court of the United States for the district of Mississippi.

This was an action on the case instituted in the district court by Reynolds, Byrne and Company against the defendants, on a letter of credit or guarantee, signed by them, and addressed to the plaintiffs in the following terms:

"*Port Gibson, December* 1827.

"Messrs Reynolds, Byrne & Co.

"Gentlemen:—Our friend, Mr Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

"Your obedient servants,

"James S. Douglass.
"John G. Singleton.
"Thomas Going."

This letter of credit was delivered to the plaintiffs; and, upon the faith of it, they were in the habit of accepting and indorsing bills and making advances for Chester Haring; and they from time to time received partial payments and consignments of cotton, to be sold by them and the proceeds placed to his credit.

thousand dollars at any subsequent times, toties quoties, whenever the antecedent transactions were discharged. It was a continuing guarantee.

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A demand of payment of the sum advanced under the guarantee, should be made of the person to whom the same was made, and in case of non-payment by him, notice of such demand and non-payment should have been given in a reasonable time to the guarantors, otherwise they would be discharged from the guarantee. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a casus fœderis. The creditors are not bound to institute legal proceedings against the debtor, but they are bound to use reasonable diligence to make demand and to give notice of non-payment.

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gave a receipt for several promissory notes, payable at distant periods, dated on the same day with the account. The notes were drawn by C. Haring, and indorsed by Daniel Greenleaf. The receipt stated that "the notes, when discounted, the proceeds to go to the credit of this account." The notes were discounted, and the proceeds received by the plaintiffs, but, being unpaid, they were protested; notice of their non-payment was given to the indorsers, and they were afterwards taken up by the plaintiffs as indorsers thereof. Held: if the plaintiffs below, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonour by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged.

IN error to the district court of the United States for the district of Mississippi.

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"Gentlemen:—Our friend, Mr Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

"Your obedient servants,

"James S. Douglass.
"John G. Singleton.
"Thomas Going."

This letter of credit was delivered to the plaintiffs; and, upon the faith of it, they were in the habit of accepting and indorsing bills and making advances for Chester Haring; and they from time to time received partial payments and consignments of cotton, to be sold by them and the proceeds placed to his credit.

The transactions between Chester Haring and the plaintiffs commenced after the receipt of the letter of guarantee, and continued until March or April 1829.

The first count in the declaration, after setting out the letter of credit, charged that the plaintiffs did, on the faith of that letter, "accept and indorse the drafts or paper of said C. Haring, to a large amount, to wit: the sum of eight thousand dollars, upon certain terms, and payable at the times expressed in said drafts and paper of the said C. Haring; which said drafts and paper of the said C. Haring, so accepted and indorsed by the plaintiffs as aforesaid, they, the plaintiffs, became liable to pay, and, in consequence of their said acceptances and indorsements, did take up, pay, and discharge the same, at the maturity thereof." The count then charged the failure of Haring to discharge or pay the paper so indorsed and accepted by the plaintiffs, &c.; and concludes with a general breach of the guarantee of the defendants, &c.

The second count was indebitatus assumpsit, for money lent, had and received, &c., and the defendants pleaded the general issue.

The evidence upon which the questions of law arose, and which were decided by the court, is fully stated in the opinion of the court.

The case was argued by Mr Jones, for the plaintiffs in error; and by Mr Taney, for the defendants.

The counsel for the plaintiffs in error cited in the argument, 12 East, 227; 2 Camp. 214; 3 Camp. 220; Coburn v. The Duke of Marlborough, 2 Maule and Selw. 18; 3 Barn. and Ald. 593; 8 John. 119; 1 Mason, 323, 324; 3 Wheat. 150, 154; 1 Mason, 368; 2 Peters's Cond. Rep. 428; 2 Taunton, 306; 7 Wheat. 13; 1 Mason, 323; 9 Wheat. 720; 1 Stark. Rep. 111; 2 Ves. Jun. 540; 18 Ves. Jun. 20; 3 Merivale, 211; 1 Pothier on Obligations, 236, 260; 1 Domat. Civil Law, 205; Civil Code of Louisiana, 954; 1 Cranch, 181; 3 Cranch, 311; 6 Cranch, 253; Peters's C. C. Rep. 262; 1 Mason, 368: 4 Greenleaf's Rep. 525; 2 Hen. Black. 613; 1 Bos. and Pul. 419; 2 Cranch, 92; 16 John. 67; 17 John. 134; 3 Peters's

Cond. Rep. 438; 2 Taunt. 306; 3 John. 68, 248; 8 John. 384, 109; 7 Mass. 449; 11 John. 449; 11 John. 180; 5 Mass. 170; 1 Serg. and Rawle, 334.

Mr Taney, for the defendants in error, cited, 2 Cranch's R. 413; 12 East, 227; 2 Camp. 29; 3 Camp. 220; 12 Wheat. 518; 1 Mason, 324, 325, 336, 368, 370; 7 Cranch, 69; 5 Peters's Rep. 626, 627; 1 Bos. and Pull. 418; 3 Wheat. 101; 20 John. 365, 366; 3 Wheat. 154; 12 Wheat. 186; 5 Cranch, 253; 1 Bos. and Pull. 421; 8 John. 389; 8 Serg. and Low. Eng. Com. Law Rep. 10, 78; 1 Desaussure's Rep. 315; Fell on Guarantee, 202; 12 Mass. 154; 3 Kent's Com. 78; 9 Greenleaf's Rep. 207, 210; 1 Wheat. 186; 12 Wheat. 186, 556; 11 Wheat. 75, 76.

Mr Justice STORY delivered the opinion of the Court.

This case comes before us upon a writ of error to a judgment of the district court of the district of Mississippi, in which the plaintiffs in error are defendants in the court below.

The original action is founded upon a guarantee, given by Douglass and others in favour of one Chester Haring, by the following letter:

"*Port Gibson, December* 1807.

"Messrs REYNOLDS, BYRNE & Co.

"Gentlemen:—Our friend, Mr Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

"Your obedient servants,

"JAMES S. DOUGLASS.

"THOMAS G. SINGLETON.

"THOMAS GOING."

The declaration contains two counts. The first alleges that, upon the faith of the letter, the original plaintiffs accepted and indorsed drafts or paper of Haring to the amount of eight thousand dollars, which they were obliged to pay, and did pay at

the maturity thereof; and of which they gave due notice to the defendants. The second count is for money lent, and money had and received. But this may be laid entirely out of the case, since it is very clear, that, upon a collateral undertaking of this sort, no such suit is maintainable.

At the trial upon the general issue and the plea of payment, the plaintiffs, who are resident merchants at New Orleans, offered evidence to prove the payment of five promissory notes, dated on the 1st of May 1829, payable to Daniel Greenleaf or order, and indorsed by him, viz.: one note due on the 20th of November 1829 for four thousand dollars; one due on the 20th of December 1829 for four thousand five hundred dollars; one due on the 20th of January 1830 for five thousand five hundred dollars; one due on the 20th of February 1830 for five thousand five hundred dollars; and one due on the 20th of March 1830 for five thousand five hundred dollars, in the whole amounting to twenty-five thousand dollars; and that the notes had been discounted with the plaintiffs' indorsement thereon, and were taken up by them at maturity.

It also appeared in evidence, that soon after the letter of guarantee had been received, acceptance had been made of the drafts of Haring by the plaintiffs to the amount of eight thousand dollars; and that other large transactions of debt and credit took place between them, upon which, on the 1st of May 1829, there was a balance of principal of twenty-two thousand five hundred and seventy-three dollars and twenty-three cents, besides interest, due to the plaintiffs, and credits to a larger amount than eight thousand dollars had come into possession of the plaintiffs. And on that day the foregoing notes were received, and the following receipt written on the account containing the balance.

"Received, Port Gibson, May 1, 1829, in part and on account of the above account, and interest that may be due thereon, the following notes, to wit, [enumerating them] amounting in all to twenty-five thousand dollars, which notes, when discounted, the proceeds to go to the credit of this account.

"REYNOLDS, BYRNE & CO."

There was a good deal of other evidence in the cause, but it

does not seem necessary to state it at large, since no part of it becomes important to a just understanding of the merits of the controversy, as it now stands before us.

In the progress of the trial the depositions of several witnesses who were clerks in the counting house of the plaintiffs were read, in which they stated, that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by Chester Haring to the plaintiffs, for advances from that time to the extent of eight thousand dollars; and that advances were made, and moneys paid by them on account of Haring from the time of receiving the said letter of credit, predicated on the said letter always protecting the plaintiffs to the amount of eight thousand dollars, whenever the said amount or less might be uncovered; and that it was considered in the said counting house of the plaintiffs as a continuing letter of credit, and so acted upon by the plaintiffs. To the admission of this part of the depositions the defendants objected; but the court overruled the objection, and permitted the evidence to be read to the jury as evidence *of the reliance of the plaintiffs upon the letter of credit to the amount of the eight thousand dollars*, for acceptances, payments, advances and indorsements made to Haring. The defendants excepted to this admission of the evidence; and the propriety of this ruling of the court, constitutes the first question in the case.

We are of opinion that the evidence was rightly admitted in the view, and for the purposes stated by the court below. It was not offered to explain or establish the construction of the letter of credit (See Russell v. Clarke, 3 Dall. 415, S. C. 7 Cranch's Rep. 69), whether it constituted a limited or a continuing guarantee; and was not thus open to the objection which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish that credit had been given to Haring upon the faith of it from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion, that no such advances, acceptances or indorsements had in fact been made upon the credit of it: an objection which, if founded in fact, might have been fatal

to their claim. Nothing can be clearer upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it; the party is not entitled to recover for any debts due to him from the debtor, in whose favour it was given, which have been incurred subsequently to the guarantee, and without any reference to it.

The other exceptions are to certain instructions prayed bv the defendants, and refused by the court.

They are as follows:

1. That the said letter of credit sued on is not a continuing guarantee, but is a limited one; and that when an advance or advances, acceptance or acceptances, indorsement or indorsements had been made by the plaintiffs on the faith of said letter of credit to the amount of eight thousand dollars, the guarantee became functus officio, and ceased to operate upon any future advances, acceptances or indorsements, made by said plaintiffs for Chester Haring. And that if the said plaintiffs received from said Haring, in payment of their advances, acceptances or indorsements, made on account of said guarantee, the amount of eight thousand dollars, it was a discharge of said letter of guarantee; and that any future advances, acceptances or indorsements, cannot be charged against and recovered from the defendants, by virtue of said letter of credit.

2. That to entitle the plaintiffs to recover on said letter of guarantee, they must prove that notice had been given, in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted.

3. That to entitle the plaintiffs to recover on said letter of credit, they must prove that, in a reasonable time after they had made advances, acceptances or indorsements for said Haring on the faith of said letters of guarantee, they gave notice to said defendants of the amount and extent thereof.

4. That to entitle the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants; and in failure of such proof, the defendants are in law discharged.

5. That the promissory notes, drawn by C. Haring, the principal debtor, and indorsed by Daniel Greenleaf, and received by the plaintiffs on the 1st of May 1829, as expressed in the said receipt of that date at the end of their said account, and the discounting the same in New Orleans by the plaintiffs after they had indorsed the same for that purpose, the same being discounted before they fell due, and the receipt of the net proceeds arising from the discounting, carried to the credit of Chester Haring's account on the books of the plaintiffs, was a discharge of the guarantors on said guarantee, provided the debt now sued for was included in the sum total of said account, on account of which said promissory notes were taken and receipted for.

6. That if the said notes, mentioned in said receipt, were received as conditional payments of said debt, the defendants are discharged, unless it be proved that due diligence has been used to recover the amount called for by said notes from the individuals responsible thereon, and that the same could not be obtained.

7. That the plaintiffs, by accepting said notes on account of said debt, from C. Haring, the principal debtor, with D. Greenleaf as indorser, on account of said debt, the same being at that time due, and receiving the money on the same by discounting them, and the passing said notes away by indorsement, could not have sued Haring for the original debt, before said notes fell due, dishonoured and returned to the plaintiffs; and that, therefore, they by their own act placed it out of their power to proceed against said Haring, to recover said debt, before said notes fell due and were returned to the plaintiffs, which, in law, discharge the guarantors.

There was another exception, but it was withdrawn from the cause by the defendants; and that, as well as another respecting the refusal of the court to sign the bill of exceptions, without incorporating in it the evidence given at the trial, may be dismissed without commentary. It is proper to add, however, that the conduct of the court in relation to the bill of exceptions constitutes no just matter of error revisable in this form of proceeding; and if it did, we see no reason to question the propriety of its conduct upon the present occasion. It is mani-

festly proper for the court to require that all the evidence which is explanatory of the true points of the exceptions should be brought before the appellate court, to assist it in forming a correct judgment.

The question involved in the first instruction is, whether the guarantee contained in the letter is a limited or a continuing guarantee; or, in other words, whether it covered advances, acceptances and indorsements, in the first instance to the amount of eight thousand dollars, and terminated when these were discharged; or whether it covered successive advances, acceptances and indorsements made to the same amount at any future times, toties quoties, whenever the antecedent transactions were discharged. Upon deliberate consideration, we are of opinion, that it is a continuing guarantee; and we found ourselves upon the language, and the apparent intent and object of the letter. Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms. It was observed by this court in Russell v. Clarke's Executors, 7 Cranch, 69, S. C. 2 Peters's Cond. Rep. 417, that "the law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction." On the other hand, as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in Drummond v. Prestman, 12 Wheat. Rep. 515, as a rule in expounding them, that the words of the guarantee are to be taken as strongly against the guarantor as the sense will admit; Fell on Guarantee, ch. 5, p. 129, &c.: and the same rule was adopted in the king's bench in Mason v. Pritchard, 12 East's Rep. 227.

If we examine the language or object of the present letter, we think it is difficult to escape from the conclusion, that it

was intended, and was understood by all the parties as a continuing guarantee. There is no doubt that it was so interpreted by the plaintiffs. The object is to assist Haring in business: "our friend Mr Chester Haring," to assist him "in business, may require your aid." It was not contemplated to be a single transaction, or an unbroken series of transactions for a limited period. The aid required was to be "from time to time, either by acceptance or indorsement of his paper, or advances in cash." The very nature of such negotiations, with reference to the business of the party, unless other controlling words accompanied them, would seem to indicate a succession of acts at different periods, having no definite termination, or necessary connexion with each other. The language of the letter then proceeds: "in order to save you from harm in so doing, we do hereby bind ourselves, &c. to be responsible to you *at any time*, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail so to do." It is difficult to satisfy this language without giving to the guarantee a continuing operation. The parties agree to be responsible *at any time* for a sum not exceeding eight thousand dollars; and if so, is not the natural, nay necessary import, that the acceptances, indorsements and advances are not limited in duration; but that whenever made, and at whatever future times, the same responsibility shall attach upon them, not exceeding eight thousand dollars? We think that it would be difficult to give any other interpretation to the language; without subjecting mercantile papers to refinements and subtleties, which would betray innocent men into the most severe losses, by an unsuspecting confidence in them. That the language fairly admits of, if it does not absolutely require this construction, cannot be doubted. If it does so, it is but common justice that it should receive this construction, in favour of innocent parties, who have made acceptances, indorsements and advances upon the faith of it; according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.

It is rare, that in cases of guarantee the language of the instruments is such as to make the decision upon one an exact authority for that of another. The whole words and clauses

are to be construed together, and that sense is to be given to each, which best comports with the general scope and intent of the whole. So far as authorities go, however, we think they are decidedly in favour of the interpretation which we have adopted. In Mason v. Pritchard, 12 East's Rep. 227, S. C. 2 Camp. 436, the words of the guarantee were, "to be responsible for any goods he hath or may supply my brother with to the amount of one hundred pounds;" and the court were of opinion that it was a continuing or standing guarantee to the extent of one hundred pounds, which might at any time become due for goods supplied until the credit was recalled. That case was certainly founded upon words less expressive and cogent than those of the case before us. In Merle v. Wells, 2 Camp. Rep. 413, the guarantee was, "I consider myself bound to you for *any* debt he (my brother) may contract for his business as a jeweller, not exceeding one hundred pounds, after this date. Lord Ellenborough held it a continuing guarantee for any debt not exceeding one hundred pounds, which the brother might from time to time contract with the plaintiffs in the way of his business; and that the guarantee was not confined to one instance, but applied to debts successively renewed. The case of Sansom v. Bell, 2 Camp. Rep. 39, before the same learned judge, is to the same effect. The case of Barton v. Bennet, 3 Camp. Rep. 220, was upon words far less stringent. There the guarantee was, "I hereby undertake and engage to be answerable to the extent of three hundred pounds for *any* tallow or soap supplied by B. to F and B., provided they shall neglect to pay in due time." Lord Ellenborough held it a continuing guarantee, principally upon the force of the word *any;* but the case went off upon another point.

The cases cited on the other side are all distinguishable. Kirby v. The Duke of Marlborough, 2 Maule and Selw. 18, turned upon the ground that the whole recital of the bond showed that a limited guarantee, for advances to a definite amount, when they were made the guarantee, became functus officio. In Melville v. Hayden, 3 Barn. and Ald. 593, the guarantee was, "I engage to guaranty the payment of A. to the extent of sixty pounds at quarterly account, bill two months,

for goods to be purchased by him of B.;" and the court held, that it was not a continuing guarantee, as the words "quarterly account" imported only the first quarterly account; and relied on the word "any" in Mason v. Pritchard, as distinguishing that case from the one before them. The case of Rogers v. Warner, 8 Johns. Rep. 119, was on a guarantee in these words. "If A. and B., our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish;" and the court held it to be a limited guarantee for a single credit. It is observable, that here no words of continuing credit, such as "from time to time," or "at any time" are used; so that the whole language is satisfied by one transaction. It is, therefore, strongly distinguishable from that before this court.

We cannot admit, therefore, as has been contended at the bar, that the courts have inclined to vary the rule of construction of instruments of this nature, and to hold them to be strictissimi juris, as to their interpretation. And we are well satisfied, that the authorities in no degree interfere with the construction which we have given to the terms of the present letter. The court below were, then, right in refusing the first instruction.

The second instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion that there was such notice, we do not inquire. It is sufficient for us to declare, that in point of law, the instruction asked was correct, and ought to have been given. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it, or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it.

The third instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that, in a reasonable time after they had made advances, acceptances or indorsements for Haring on the faith of the guarantee, they gave notice to the defendants of the amount and extent thereof. If this had been the case of a guarantee limited to a single transaction, there is no doubt that it would have been the duty of the plaintiffs to have given notice of the advances, acceptances or indorsements made to Haring, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplated a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances and indorsements, which would be renewed and discharged from time to time, we cannot perceive any ground of principle or policy, upon which to rest the doctrine that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible, should, within a reasonable time afterwards, be communicated to them. And if the instruction had asked nothing more than this, we are of opinion, upon principle, as well as upon the authority of Russell v. Clarke's Executors, 7 Cranch, 69, S. C. 2 Peters's Cond. Rep. 417; and Edmondston v. Drake, 5 Peters's Rep. 624, that it ought to have been given. Oxley v. Young, 2 H. Bl. 613; Peel v. Tatlock, 1 Bos. and Pull. 419. But it goes much further, and requires, in the case of a continuing guarantee, that every successive transaction under it should be communicated from time to time. No case has been cited which justifies such a doctrine, and we can perceive no principle of law which requires it. The instruction was therefore properly refused.

The fourth instruction insists, that a demand of payment should have been made of Haring, and, in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guarantee.

We are of opinion that this instruction ought to have been been given. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements are indispensable to constitute a casus fœderis. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose; but have a right to insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt has become due(*a*). The case of Allen v. Rightmere, 20 Johns. Rep. 365, is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he indorsed it with a special guarantee of its due payment; and the court held his engagement absolute, and not conditional.

The fifth instruction insists that the promissory notes mentioned in the receipt of the 1st of May 1829, when discounted, and the proceeds carried to the account of Haring, operated a discharge of the guarantors, provided the debt sued for was included in the sum total of the account for which those notes were received. We think that the court were not bound under the circumstances to give this instruction. It proceeds upon the ground, that the notes were necessarily received as an absolute payment, a fact which the court had no right to assume, and that, by indorsing the notes and procuring the same to be discounted and credited in the account, the guarantee was, per se, discharged. This is not correct in point of law; for if the plaintiffs, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonour by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

(*a*) See on this subject Mr Wheaton's note to Lanusse v. Barker, 3 Wheat. Rep. 154, 155.

The sixth instruction asserts, that if the notes mentioned in the receipt, were received as conditional payments of the said debt, the defendants are discharged, unless it is proved that due diligence had been used to *recover* the amount of them from the individuals responsible thereon, and that the same could not be obtained. If, by the word "recover," were here intended a recovery by a suit at law, the proposition could not be maintained. But if, as we suppose, it is used in the sense of collect or obtain; its correctness, as a general proposition in cases of conditional payments of debts by notes, is admitted. He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. The difficulty is in applying the doctrine to the circumstances of the present case in the actual form in which it is propounded in the instruction. It assumes, as matter of fact, what the court cannot intend, that the notes were received as conditional payment. It does not assert what the debt is to which it alludes; though it probably refers to the debt stated in the account connected with the receipt. Now, that account is not in terms sued for; but certain drafts amounting to eight thousand dollars, accepted and indorsed, and paid by the plaintiffs: and whether they were included in the account or not, was matter of evidence and not matter of law. Although then the instruction asserted a proposition generally true in point of law, it is not clear, that, in the very terms in which it is propounded, with reference to the case in judgment, the court were bound to give it, since it involved matters of fact.

The seventh instruction is open to a similar objection. It manifestly assumes, as its basis, general questions of fact, upon which the court had no right to pronounce judgment. It also supposes that the debt sued for is wholly confined to the account, and that the notes referred to were not within the scope of the guarantee, and, if paid by the plaintiffs, could not be recovered by the defendants; which is far from being admitted. Indeed, this, and several of the preceding instructions proceed upon the ground, that the guarantee was a limited

and not a continuing guarantee, which construction has been already overturned.

Upon the whole, we are of opinion that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed, and the cause remanded to the district court of Mississippi with directions to award a venire facias de novo.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Mississippi, and was argued by counsel: on consideration whereof, it is the opinion of this court that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed. Whereupon, it is adjudged and ordered by this court, that the judgment of the said district court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said district court with directions to award a venire facias de novo.

Hyppolitus Joseph Augustine Estho et al. v. Benjamin L. Lear, administrator of Thaddeus Kosciuszko.

A case not being properly prepared in the circuit court for a hearing, the decree was reversed, and the cause remanded, with liberty to the plaintiff to amend his bill.

AN appeal from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington.

The case was argued by Mr Swann and Mr Sampson, for the appellants; and by Mr Wirt and Mr Dandridge, for the appellees.

Mr Chief Justice Marshall delivered the opinion of the Court.

The appellants had filed their bill in the court of the United States for the county of Washington, alleging themselves to be the distributees and next of kin of Thaddeus Kosciuszko, deceased, who departed this life intestate, as they allege, with respect to personal property in the United States. The bill charges that Thaddeus Kosciuszko, being about to leave America, deposited with Mr Jefferson a paper writing purporting to be a will which was executed in Virginia, and is in the following words:

"I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and direct, that, should I make no other testamentary disposition of my property in the United States, I hereby authorize my friend, Thomas Jefferson, to employ the whole thereof in purchasing negroes from among his own, or any others, and giving them liberty in my name, in giving them an education in trade or otherwise, and in having them instructed for their new condition in the duties of morality, which may make them good neighbours, good fathers or mothers, husbands or wives, in their duty as citizens, teaching them to be defenders of their liberty and country, and of

the good order of society, and in whatsoever may make them happy and useful; and I make the said Thomas Jefferson executor of this.

"T. Kosciuszko.

"*5th May* 1798."

After the testator's death, Mr Jefferson proved the will in the county court of Albemarle, but renounced the executorship. Letters of administration have since been granted on it in the county of Washington in this district, to Benjamin L. Lear, who is in possession of the fund which is referred to in the paper writing. The plaintiffs contend that this paper writing is not a will; or if a will, cannot have effect, the bequest contained in it being one which the law will not sustain. They therefore contend that, this will being void and inoperative, they, as the next of kin, are entitled to this fund, there being no creditors to claim.

The answer insists on the validity of the will, and that the defendant is ready to carry the trust into execution.

Before the court can decide the intricate questions which grow out of this will, we think it necessary to possess some information which the record does not give.

The domicil of general Kosciuszko is not stated. He was a native of Poland, and died in Switzerland. Whether he was domiciliated in Switzerland or not does not appear. The law of domicil, with respect to wills in cases of testacy, or regulating distribution in cases of intestacy, may be material.

It also appears that the testator made a will in Europe. From the manner in which the subject is mentioned, we presume that this makes no disposition of his property in the United States; but, since we are informed of its existence, it would be desirable to see it.

We do not think the case properly prepared for decision; and therefore direct that the decree be reversed and the cause remanded, with liberty to the plaintiff to amend his bill.

The United States v. Abel Turner.

Indictment in the circuit court of North Carolina for the forgery of, and an attempt to pass, &c. a certain paper writing in imitation of, and purporting to be a bill or note issued by the president, directors and company of the Bank of the United States, founded on the eighteenth section of the act of 1816, establishing the Bank of the United States. The note was signed with the name of John Huske, who had not been at any time president of the Bank of the United States, but who, at the time of the date of the counterfeit, was the president of the office of discount at Fayetteville; and was countersigned by the name of John W. Sandford, who at no time was cashier of the mother bank, but was at the said date cashier of the said office of discount and deposit. Held, that this was an offence within the provisions of the law.

It is clear that the policy of the act extends to the case. The object is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank. It could not be presumed that persons in general could be cognizant of the fact who, at particular periods, were the president and cashier of the bank. They were officers liable to be removed at the pleasure of the directors, and the times of their appointment or removal, or even their names, could not ordinarily be within the knowledge of the body of the citizens. The public mischief would be equally great, whether the names were those of the genuine officers, or of fictitious or unauthorized persons, and ordinary diligence would not protect them against imposition.

ON a certificate of division from the circuit court of the United States for the district of North Carolina.

The defendant, Abel Turner, was indicted at May term 1832, in the circuit court, under the eighteenth section of the act, incorporating the Bank of the United States, passed in April 1816.

The indictment contained four counts.

The first count charged the defendant with having forged and counterfeited a bill or note issued by the orders of the president, directors and company of the Bank of the United States, the tenor of which said false, forged and counterfeited paper writing is as follows, to wit, "the president, directors and company of the Bank of the United States promise to pay twenty dollars, on demand, at their office of discount and de-

posit, in Fayetteville, to the order of D. Anderson, cashier thereof, Philadelphia, the 4th of July 1827, John W. Sandford, cashier, John Huske, president," with intent to defraud the president, directors and company of the Bank of the United States, against the form of the act of congress, &c.

The second count charged the defendant with an attempt to pass the said note, describing it in the same form, knowing it to be forged, with intent to defraud the Bank of the United States.

The third count charged the offence of passing, uttering and publishing the same note, with intent to defraud the bank.

The fourth and fifth counts charged the defendant with an attempt to pass, and with having passed the note to one Elliott, with intent to defraud him. The note was described in these counts in the same form and terms as in the first count.

The jury found the defendant guilty on the fourth and fifth counts, and not guilty as to the residue.

Upon the trial of the cause it occurred as a question, whether the attempt to pass the counterfeit bill, in the indictment mentioned, knowing the same to be counterfeit, the said bill being signed with the name of John Huske, who had not, at any time, been president of the Bank of the United States, but at the time of the date of the said counterfeit bill was the president of the office of discount and deposit of the Bank of the United States at Fayetteville, and countersigned with the name of John W. Sandford, who at no time was cashier of the Bank of the United States, but was, at the date aforesaid, cashier of the said office of discount and deposit, was an offence within the provisions of the act entitled an act to incorporate the subscribers to the Bank of the United States: upon which question, the judges, being divided in opinion, ordered that the same should be certified to the supreme court of the United States for the opinion of that court.

The case was argued by the attorney-general, for the United States; no counsel appeared for the defendant.

The attorney-general stated that the note described in the indictment, was in all respects the same as a note of the mother bank, excepting the signatures of the president and cash-

ier of the bank. Instead of those signatures, the names of the president and cashier of the branch bank at Fayetteville were affixed to the note. The question is, whether this bill came within the description in the eighteenth section of the act incorporating the bank, which punishes the offence charged as counterfeiting a bill or note issued by order of the bank. The question turns upon the interpretation of the word "purport" in the section. If the paper purports to be a bill or note of the bank it is enough; although it may not be signed by the proper officers of the bank.

The cases which have been decided in England fully maintain this position. They are found in 2 Russell on Crimes, 338, 340, 342, 344, 345, 346, 363, 365, 366, 456, 470, 471; and in 10 Petersdorf's Abridg. 55, 56.

Mr Justice Story delivered the opinion of the Court.

This cause comes before the court upon a certificate of division of opinion of the judges of the circuit court for the district of North Carolina. The defendant, Abel Turner, was indicted for the forgery of, and an attempt to pass, &c. a certain paper writing in imitation of, and purporting to be a bill or note issued by the president, directors and company of the Bank of the United States. The indictment contained several counts, all founded upon the eighteenth section of the act of the 10th of April 1816, ch. 44, establishing the Bank of the United States. Upon the trial of the cause it occurred as a question, whether the attempt to pass the counterfeit bill in the indictment mentioned, knowing the same to be counterfeit, the said bill being signed with the name of John Huske, who had not at any time been president of the Bank of the United States, but at the time of the date of the said counterfeit bill was the president of the office of discount and deposit of the Bank of the United States at Fayetteville, and countersigned by the name of John W. Sandford, who at no time was cashier of the Bank of the United States, but was, at the date aforesaid, cashier of the said office of discount and deposit, was an offence within the provisions of the act. Upon this question the court, being divided in opinion, ordered the same to be certified to this court.

The bill or note itself is not set forth in haec verba, except in the count on which the question arose, and which charges that the defendant, with force and arms, &c. "feloniously did attempt to pass to one S. E. as and for a true and good bill or note, a certain false, forged and counterfeit paper writing, the tenor of which, &c. is as follows, 'the president, directors and company of the Bank of the United States promise to pay twenty dollars on demand, at their office of discount and deposit in Fayetteville, to the order of D. Anderson, cashier thereof, Philadelphia, the 4th of July 1827, John W. Sandford, cashier, John Huske, president,' with intent to defraud the president, directors and company of the Bank of the United States." The bill therefore purports on its face to be signed by persons who are respectively president and cashier of the bank.

One of the fundamental articles of the charter (sect. 11, art. 12) declares that the bills and notes which may be issued by order of the corporation, signed by the president and countersigned by the cashier, promising the payment of money to any person or persons, his, her or their order, or to bearer, shall be binding and obligatory on the same. So that the present counterfeit bill purports to be signed by officers, who were the proper officers to sign the genuine bills of the bank.

The persons named in the counterfeit bill not being in fact the president and cashier, although so called; the question arises, whether the party is liable to indictment for an attempt to pass it, under the eighteenth section of the act of 1816.

We are of opinion, that he is, within the words and true intent and meaning of the act. The words of the act are, "if any person shall falsely make, &c., or cause or procure to be falsely made, &c., or willingly aid or assist in falsely making, &c., any bill or note in imitation of, or purporting to be a bill or note issued by order of the president, directors and company of the said bank, &c. &c.; or shall pass, utter or publish, or attempt to pass, utter or publish as true any false, &c. bill or note, purporting to be a bill or note issued by the order of the president, directors and company of the said bank, &c., knowing the same to be falsely forged or counterfeited, &c., every such person, &c. &c." The case, therefore, falls directly within the terms of the act. It is an attempt to pass a false

bill or note as true, purporting to be a bill or note issued by the order of the president, directors and company; for the word "purport" imports what appears on the face of the instrument. Jones's Case, Douglas, 802; 2 Russell on Crimes, b. 4, ch. 32, sec. 1, p. 345, 346, 2d edition; Id. 363 to 367. The preceding clause of the section very clearly shows this to be the sense of the word in this connexion. It is there said, if any person shall falsely make, &c. any bill "*in imitation of* or *purporting to be a bill*," &c. where the words "in imitation of" properly refer to counterfeiting a genuine bill, made by the proper, authorized officers of the bank; and the words "or purporting to be," properly refer to a counterfeit bill, which on its face appears to be signed by the proper officers. In the view of the act then, it is wholly immaterial whether the bill attempted to be passed be signed in the name of real or fictitious persons, or whether it would, if genuine, be binding on the bank or not.

And it is equally clear, that the policy of the act extends to the case. The object is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank. It could not be presumed that persons in general would be cognizant of the fact, who at particular periods were the president and cashier of the bank. They were officers liable to be removed at the pleasure of the directors; and the times of their appointment or removal, or even their names, could not ordinarily be within the knowledge of the body of the citizens. The public mischief would be equally great, whether the names were those of the genuine officers, or of fictitious or unauthorized persons; and ordinary diligence could not protect them against imposition. 2 East's P. C. ch. 19, sec. 44, p. 950; 2 Russell on Crimes, b. 4, ch. 32, sec. 1, p. 341, 2d edition.

Upon examining the English authorities upon the subject of forgery and the utterance of counterfeit paper, they appear to us fully to justify and support a similar doctrine. It is, for instance, clearly settled that the making of a false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of a person known to exist, and to whom credit was due. 2 Russell on Crimes,

b. 4, ch. 32, sec. 1, 2d edition, p. 327 to 333, and the cases there cited; Id. 470, 474; 2 East, P. Cr. ch. 19, sec. 38, p. 940. Nor is it material whether a forged instrument be made in such a manner, as that if in truth it were such as it is counterfeited for, it would be of validity or not. This was decided as long ago as Deakins's case, 1 Siderf. Rep. 142; 1 Hawk. Pl. Cr. ch. 70, sec. 7; 2 East, P. C. ch. 19, sec. 43, p. 948. Nor is it any answer to the charge of forgery, that the instrument is not available, by reason of some collateral objection not appearing upon the face of it. 2 Russell on Crimes, b. 4, ch. 32, sec. 1, 2d edition, p. 337 to 341; Id. 470 to 474.

So that upon the words and policy of the act itself, as well as upon the footing of authority, we are of opinion, that the offence stated in the division of opinion is within the act of 1816. And we shall accordingly certify this to the circuit court.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of North Carolina, and on the question and point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel: on consideration whereof, it is the opinion of this court, that the attempt to pass the counterfeit bill in the indictment in the proceedings mentioned under the circumstances in the said certificate of division of opinion mentioned, is an offence within the provisions of the act of congress stated in the same certificate: whereupon, it is adjudged and ordered by the court, that it be certified to the said circuit court for the district of North Carolina, that the attempt to pass the counterfeit bill in the indictment in the proceedings mentioned under the circumstances in the said certificate of division of opinion mentioned, is an offence within the provisions of the act of congress stated in the same certificate.

THE UNITED STATES v. JOHN B. MILLS.

he defendant was indicted upon the twenty-fourth section of the act of congress of 3d March 1825, entitled "an act to reduce into one the several acts establishing and regulating the post office department," for advising, procuring and assisting one Joseph I. Straughan, a mail carrier, to rob the mail; and was found guilty. Upon this finding, the judges of the circuit court of North Carolina were divided in opinion on the question, whether an indictment founded on the statute for advising, &c. a mail carrier to rob the mail, ought to set forth or aver that the said carrier did in fact commit the offence of robbing the mail? By the court:

The answer to this, as an abstract proposition, must be in the affirmative. But if the question intended to be put is, whether there must be a distinct substantive averment of that fact: it is not necessary. The indictment in this case sufficiently sets out that the offence had been committed by the mail carrier.

The offence charged in this indictment is a misdemeanour where all are principals; and the doctrine applicable to principal and accessary in cases of felony, does not apply. The offence, however, charged against the defendant is secondary in its character; and there can be no doubt that it must sufficiently appear upon the indictment, that the offence alleged against the chief actor had been committed.

ON a certificate of division from the circuit court of the United States for the district of North Carolina.

The defendant was indicted at the term of November 1832 of the circuit court, for an offence against the post office laws passed on the 2d of March 1824, entitled, "an act to reduce into one act the several acts establishing and regulating the post office department."

The indictment contained two counts.

The first count charged that the defendant did, "at Fayetteville, on the 1st June 1832, procure, advise and assist Joseph I. Straughan to secrete, embezzle and destroy a mail of letters, with which the said Joseph I. Straughan was entrusted, and which had come to his possession, and was intended to be conveyed by post from Pittsborough, in the district aforesaid, to Fayetteville, also in said district, containing bank notes; the said Joseph I. Straughan being, at the time of such procuring, advising and assisting, then and there a person employed in

one of the departments of the post office establishment, to wit, a carrier of the mail of the United States from Pittsborough aforesaid to Fayetteville aforesaid, contrary to the form of the act of congress," &c.

The second count was in the following words: that the defendant "did procure, advise and assist Joseph I. Straughan to secrete, embezzle and destroy a letter addressed by Joseph Small to Joseph Baker, with which the said Joseph I. Straughan was entrusted, and which came to his possession, and was intended to be conveyed by post from Pittsborough, in the district aforesaid, to Fayetteville, aforesaid, containing sundry bank notes, amounting, in the whole, to sixty dollars, of a discrimination to the jurors aforesaid unknown, and of the issue of a bank to the said jurors also unknown; the said Joseph I. Straughan being, at the time of such procuring, advising and assisting, then and there a person employed in one of the departments of the post office establishment, to wit, a carrier of the mail of the United States from Pittsborough aforesaid to Fayetteville aforesaid, contrary to the form of the act of congress," &c.

The jury found the defendant guilty on both counts; and a motion was made in arrest of judgment on the following grounds:

1. That the indictment doth not aver, charge, or in any manner show, that the said Joseph I. Straughan did commit the offence which this defendant is alleged to have procured and advised and assisted him to commit.

2. That the said indictment is, in other respects, uncertain, insufficient, informal and defective, and will, in no sort, warrant any judgment upon the said verdict.

Upon this motion the following certificate of division was given:

"The defendant was indicted upon the twenty-fourth section of the act of congress approved the 2d of March 1825, entitled an act to reduce into one the several acts establishing and regulating the post office department, for advising, procuring and assisting one Joseph I. Straughan, mail carrier. to rob the mail, and being found guilty, submitted a motion in arrest of judgment; one reason in support of which motion

was, that the indictment did not sufficiently show any offence against the said act, because the same did not directly charge, or otherwise aver, that the said Joseph I. Straughan did actually rob the mail, and, upon argument, the judges were opposed in opinion upon this question, to wit: whether an indictment, grounded upon the said statute, for advising, &c. a mail carrier to rob the mail ought to set forth or aver that the said carrier did, in fact, commit the offence of robbing the mail, and, therefore, the judges directed the same to be certified to the supreme court.

The case was argued for the United States by the attorney-general, Mr Taney; no counsel appeared for the defendant.

He stated that the charge, so far as it is material to the question submitted to the court in the certificate of division, is contained in the first count; "that the defendant did procure, advise and assist" the mail carrier to secrete, embezzle and destroy the mail of the United States. In neither count is there an averment that the offence of secreting, embezzling or destroying the mail was actually committed.

But as the offence charged is a misdemeanour, all are principals; and the law which requires that before the accessary can be convicted, the principal must be proved to have been guilty, and the offence to have been committed, does not apply. As this is a statute offence, it is sufficient to bring the offender within the words of the law; and it may be urged that the words themselves contain in themselves a sufficient averment.

Upon the authority of the decision of this court in the United States v. Goodin, 12 Wheat. 466, 474, it is submitted that the indictment may be sustained.

Upon English authorities it is sufficient to lay the offence in the words of the law. 2 East's Pl. Cr. 781; 2 Leach, Crim. Cases, 578; 5 T. R. 33.

Mr Justice Thompson delivered the opinion of the Court.

The defendant was indicted in the circuit court of the United States for the district of North Carolina, under the twenty-fourth section of the act of 1825, entitled "an act to reduce

into one, the several acts establishing and regulating the post office department" (7 Laws U. S. 377), which declares "that every person, who, from and after the passing of this act, shall procure and advise, or assist in the doing or perpetration of any of the acts or crimes by this act forbiden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes, according to the provisions of this act." Upon the trial the defendant was convicted of the offence charged in the indictment, and a motion was made in arrest of judgment, upon which motion the judges were opposed in opinion, and the case comes here upon the following certificate:

"The defendant was indicted upon the twenty-fourth section of the act of congress, approved the 3d of March 1825, entitled "an act to reduce into one, the several acts establishing and regulating the post office department," for advising, procuring and assisting one Joseph I. Straughan, mail carrier, to rob the mail, and, being found guilty, submitted a motion in arrest of judgment: one reason in support of which motion was, that the indictment did not sufficiently show any offence against the said act, because the same did not directly charge or otherwise aver, that the said Joseph I. Straughan did actually rob the mail; and upon argument the judges were opposed in opinion upon this question, to wit, whether an indictment grounded upon the said statute, for advising, &c. a mail carrier to rob the mail, ought to set forth or aver, that the said carrier did in fact commit the offence of robbing the mail, and therefore the judges directed the same to be certified to the supreme court.

The offence charged in this indictment is a misdemeanour, where all are principals; and the doctrine applicable to principal and accessary in cases of felony does not apply. The offence, however, charged against the defendant, is secondary in its character; and there can be no doubt, that it must sufficiently appear upon the indictment, that the offence alleged against the chief actor had in fact been committed.

The first count in the indictment alleges that the defendant did, at the time and place therein mentioned, procure, advise and assist Joseph I. Straughan to secrete, embezzle and destroy a letter with which he, the said Joseph I. Straughan

was entrusted, and which had come to his possession, and was intended to be conveyed by post, &c., containing bank notes, &c. He, the said Joseph I. Straughan, being at the time of such procuring, advising and assisting, a person employed in one of the post office establishments, to wit, a carrier of the mail, &c., contrary to the form of the act of congress in such case made and provided.

The second count in the indictment sets out the particular letter secreted, embezzled and destroyed, containing bank notes amounting to sixty dollars.

The offence here set out against Straughan, the mail carrier, is substantially in the words of the statute, second section. If any person employed in any of the departments of the post office establishment, shall secrete, embezzle or destroy any letter, packet, bag, or mail of letters with which he shall be entrusted, or which shall have come to his possession, and is intended to be conveyed by post, containing any bank note, &c., such person shall, on conviction, be imprisoned, &c.

The general rule is, that in indictments for misdemeanours created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged.

And we think the present indictment contains such certainty, and sufficiently alleges, that the offence had, in point of fact, been committed by Straughan. It charges the defendant not only with advising, but procuring and assisting Straughan to secrete and embezzle, &c. This necessarily implies that the act was done; and is such an averment or allegation, as made it necessary on the part of the prosecution to prove that the act had been done.

The particular question put in the certificate of division is, whether an indictment, grounded upon the said statute for advising, &c. a mail carrier to rob the mail, ought to set forth or

aver that the said carrier did in fact commit the offence of robbing the mail. The answer to this, as an abstract proposition, must be in the affirmative. But if the question intended to be put is, whether there must be a distinct, substantive and independent averment of that fact, we should say it is not necessary, and that the indictment in this case sufficiently sets out that the offence had been committed by Straughan, the mail carrier; and that no defect appears in the indictment for which the judgment ought to be arrested.

A certificate to this effect must accordingly be sent to the circuit court.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of North Carolina, and on the question and point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel: on consideration whereof, it is the opinion of this court that the indictment in this case sufficiently sets out that the offence had been committed by Straughan, the mail carrier; and that no distinct, substantial and independent averment of that fact was necessary, and that there is no sufficient cause for arresting the judgment: whereupon it is adjudged and ordered by this court, that it be certified to the said circuit court that the indictment in this case sufficiently sets out that the offence had been committed by Straughan, the mail carrier, and that no distinct, substantial and independent averment of that fact was necessary, and that there is no sufficient cause for arresting the judgment.

Martin Pickett's Heirs, plaintiffs in error v. Samuel Legerwood et al.

The court refused to quash a writ of error on the ground that the record was not filed with the clerk of the court until the month of June 1832, the writ having been returnable to January term 1832. The defendant in error might have availed himself of the benefit of the twenty-ninth rule of the court, which gave him the right to docket and dismiss the cause.

The appropriate use of a writ of error, coram vobis, is to enable a court to correct its own errors, those errors which precede the rendition of the judgment. In practice the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and the latter mode has superseded the former in the British practice.

In the circuit court for the district of Kentucky, a judgment in favour of the plaintiff in an ejectment was entered in 1798, and no proceedings on the same until 1830; when the period of the demise having expired, the court, on motion, and notice to one of the defendants, made an order inserting a demise of fifty years. It having been afterwards shown to the court that the parties really interested in the land, when the motion to amend was made, had not been noticed of the proceeding, the court issued a writ of error coram vobis, and gave a judgment sustaining the same, and that the order extending the demise should be set aside. From this judgment a writ of error was prosecuted to this court; and it was held that the judgment on the writ of error coram vobis, was not such a judgment as could be brought up by a writ of error for decision to this court.

IN error to the circuit court of the United States for the district of Kentucky.

In the circuit court of Kentucky, at November term 1831, the defendants in error, Samuel Legerwood, Hugh Roseberry, William Henderson, *William Mitchell* and John Graves, filed a petition, stating that in 1796 a certain Martin Pickett brought his action of ejectment in the district court of the United States of the Kentucky district, against *William Mitchell* and *William Maxwell*. That the petitioner, Samuel Legerwood, under whose father and testator William Legerwood, the said defendants who were tenants claimed, was, with the said tenants, made defendant; and in 1798 a judgment was obtained in the said court in favour of Pickett, but no writ of possession was

executed in favour of Pickett. The demise in the declaration was laid at ten years, and expired in 1806, and remained dead and inoperative for nearly twenty-five years, when, before the spring term of the court in 1830, a notice was served by the attorney for the devisees of Martin Pickett on *William Mitchell*, that the court would be moved to amend the demise by inserting a new one; and on the sixth day of the term he procured an order to be made, inserting a demise of fifty years, without the knowledge of any person interested in the said land at that time, which ex parte order was not discovered until one year after. That a writ of possession was then, at the time of filing the petition, in the hands of the marshal, and he was about to take possession of the said land.

The petition proceeds to set forth the title under which William Legerwood, the father of Samuel Legerwood, claimed the land, against the title set up by Martin Pickett. That William Mitchell, one of the defendants in the suit, was a tenant of part of the land; that the tract of Legerwood was, several years after the judgment in ejectment, sold by an execution in favour of the devisees of Pickett, and was bought by Thomas Starke, to whom the sheriff conveyed the same; to whom also William Mitchell, the said defendant, sold out his interest in the land, and moved away nearly one hundred miles from the land; and has not for many years been a tenant of it. This fact is alleged to have been well known to the attorney for the devisees of Pickett; and that Mitchell, having no interest in the same, gave no information of the intended motion to the rest of the petitioners, who are terre tenants. The petition proceeds to state sundry conveyances and devises of the land under which the parties to the petition all became owners or claimants of the same, or possessors thereof, before the said motion to amend the demise, and the notice of the same to William Mitchell.

The petitioners Henderson, Graves and Roseberry say they are exclusive terre tenants, and, as such, were entitled to notice, even if the judgment was to be revived by scire facias; and that Mitchell had not been a terre tenant for upwards of ten or twelve years, and had no interest therein. That Samuel Legerwood has never been a terre tenant, but was entered

defendant for those claiming under the title of his deceased father, and that *Maxwell* has abandoned the possession, and has been dead for many years.

The petition prays the court to award a writ of error coram vobis, to reverse and annul the order extending the demise, and to quash the impending writ of habere facias possessionem; and for such other relief as the case requires.

The circuit court ordered an injunction to stay proceedings on the habere facias: and on the 26th November 1831 the following judgment was entered:

"The court being now sufficiently advised of and concerning the premises, do consider that the plaintiff's writ of error coram vobis, be sustained; that the order extending the demise in the declaration of Seekright, on demise of Pickett against Mitchell, &c. be set aside, and the habere facias which issued thereon be quashed; and that the plaintiffs recover of the defendants their costs herein expended."

From this judgment the plaintiffs in error, on the 28th of November 1831, prosecuted a writ of error to this court. The citation is dated of the 28th November 1831, and required the defendants in error to appear at the January term 1832 of this court.

The record brought up by the writ of error, was filed in June 1832.

Mr Loughborough, for the defendants in error, moved to quash the writ of error on the following grounds.

1. Because, although the writ of error was returnable to January term 1832 of this court, the record was not filed until June 1832, the term of January 1832 having thus intervened.

2. Because the proceedings of the circuit court on the writ of error coram vobis, were not of such a nature as to admit of revision in this court; it being no more than a different form or mode of exercising the power the circuit court had over its acts, and therefore subject to the rules which this court have established against revising the interlocutory acts or orders of inferior courts.

The motion was opposed by Mr Wickliffe, for the plaintiffs in error.

[Pickett's Heirs v. Legerwood et al.]

Mr Justice JOHNSON delivered the opinion of the Court.

This was a motion to quash the writ of error upon two grounds.

The first was because the record was not filed with the clerk of this court until the month of June 1832, whereas the writ of error was duly served, returnable to the January term 1832. It was contended that the case was out of court by lapse of time, and the filing at that late day could not reinstate it. But on this ground we are of opinion that the motion cannot be sustained; since the defendant in error might have availed himself of the benefit of the rule of court, which gave him the right to docket and dismiss the cause. This court decided in the case of Wood and Lide, that provided the service be before the return day of the writ, a return at a subsequent day will be sustained. 4 Cranch, 150, 2 Peters's Cond. Rep. 76.

The second ground is one which required more examination. The judgment below was rendered on a writ of error coram vobis, sued out in the same court, for the purpose of correcting an error committed at a previous term, and into which it was contended that the court had been surprised. We are not now called upon to decide on the merits of the cause below; nor whether it was a case proper for the application of that remedy. The motion here is to quash the writ of error, upon the ground that it is an exercise of jurisdiction in the court below which does not admit of revision in this tribunal: that it is but a different form or mode of exercising the power of the court of the first resort over its own acts, and is therefore subject to the same exceptions which have always been sustained in this court, against revising the interlocutory acts and orders of the inferior courts.

It cannot be questioned that the appropriate use of the writ of error coram vobis, is to enable a court to correct its own errors; those errors which precede the rendition of judgment. In practice the same end is now generally attained by motion; sustained, if the case require it, by affidavits; and it is observable, that so far has the latter mode superseded the former in the British practice, that Blackstone does not even notice this suit among his remedies. It seems, it is still in frequent use in some of the states; and upon points of fact to which the remedy

extends, it might, perhaps, be beneficially resorted to as the means of submitting a litigated fact to the decision of a jury; an end which, under the mode of proceeding by motion, might otherwise require a feigned issue, or impose upon a judge the alternative of deciding a controverted point upon affidavit, or opening a judgment, perhaps to the material prejudice of the plaintiff, in order to let in a plea.

But in general, and in the practice of most of the states, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice, if we decide that it is not one of those remedies over which the supervising power of this court is given by law.

The cases for error coram vobis, are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law. I will refer to the pages of Archbold for the following enumeration. (1st Vol. 234, 276, 277, 278, 279.) "Error in the process, or through default of the clerk; error in fact, as where the defendant being under age sued by attorney, in any other action but ejectment; that either plaintiff or defendant was a married woman at the commencement of the suit; or died before verdict or interlocutory judgment, and the like."

But all the books concur in quoting the language of Roll's Abridgement, p. 749, "that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court."

The writ of error in this case was but a substitute for a motion to the court below, to correct an error of its own, in granting improvidently a motion for leave to amend. Many years had elapsed since entering a judgment in ejectment; the term declared on had long since expired; the terre tenant was changed; only one of the original defendants survived, and he had removed to a great distance from the premises recovered; on him alone notice of the motion was served; and the court, unaware of these facts, granted leave to amend the declaration in the original suit by extending the term more than twenty years, so as to enable the plaintiffs to sue out a writ of possession. This writ of error was sued out to enable the court

below to correct that error; they have ordered that it shall be corrected; and from that order to set aside their former order and quash the writ of possession, is the appeal now made to the reversing power of this court.

We think the case comes precisely within the rule laid down by this court in the case of Waldon v. Craig, 9 Wheat. 576; with this difference, that the latter was a case in which the court thought so favourably of the claim of the plaintiff in error, that they would have sustained the suit if it had been possible. The court there express themselves thus. "There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. But the course of this court has not been in favour of the idea that a writ of error will lie to the opinion of a circuit court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed."

In that case, as in this, the motion was to extend a term in ejectment, after judgment; but where the plaintiff's delay in proceeding with his writ of possession, was not attributable to his own laches. He had been arrested in his course by successive injunctions sued out by the defendants. This court did there recognize the case of delay by injunction as one in which, in that action, the court might exercise the power to enlarge the term even after judgment, and the particular case as one which merited that exercise of discretion; but dismissed the writ of error because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment.

On consideration of the motion made to dismiss this writ of error to the circuit court of the United States for the district of Kentucky, it is now here ordered and adjudged by this court, that this writ of error to the said circuit court be, and the same is hereby dismissed with costs.

THE UNITED STATES v. GEORGE WILSON.

The defendant was indicted for robbing the mail of the United States, and putting the life of the driver in jeopardy, and the conviction and judgment pronounced upon it extended to both offences. After this judgment no prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded.

The power of pardon in criminal cases had been exercised from time immemorial by the executive of that nation whose language is our language; and to whose judicial institutions, ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon; and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and would overturn those rules which have been settled by the wisdom of ages.

There is nothing peculiar in a pardon which ought to distinguish it in this respect from other facts: no legal principle known to the court will sustain such a distinction. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

It may be supposed that no being condemned to death would reject a pardon, but the rule must be the same in capital cases and in misdemeanours. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment.

The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances

combine to show that this, like any other deed, ought to be brought "judicially before the court, by plea, motion or otherwise."

The reason why a court must, ex officio, take notice of a pardon by act of parliament, is, that it is considered as a public law, having the same effect on the case as if the general law punishing the offence had been repealed or annulled.

THIS case came before the court on a certificate of division of opinion from the judges of the circuit court of the United States for the eastern district of Pennsylvania.

At the April sessions 1830 of that court, six indictments were presented to and found by the grand jury against James Porter and George Wilson: one for obstructing the mail of the United States from Philadelphia to Kimberton on the 26th day of November 1829; one for obstructing the mail from Philadelphia to Reading on the 6th day of December 1829; one for the robbery of the Kimberton mail, and putting the life of the carrier in jeopardy, on the same day in November 1829; one for robbery of the Reading mail, and putting the life of the carrier in jeopardy, on the same 6th day of December 1829; one for robbery of the Kimberton mail also on the 26th of November 1829; and one for robbery of the Reading mail also on the 6th of December 1829. At the same sessions two other indictments were presented to the grand jury against the same defendants, in which they were severally charged with robbery of the Reading and Kimberton mail, and wounding the carrier, which were returned to the court as "true bills, except as to wounding the carrier." Upon the indictment for robbery of the Kimberton mail, and putting the life of the carrier in jeopardy, and also in the two last mentioned indictments, a nolle prosequi was afterwards entered by the district attorney of the United States. On the 26th day of April 1830 the defendants James Porter and George Wilson pleaded not guilty to the several bills upon which they were arraigned: and on the 1st of May a verdict of guilty was rendered against them upon the indictment for robbery of the Reading mail, and putting the life of the carrier in jeopardy.

The circuit court, on the 27th of May 1830, sentenced the defendants to suffer death on the 2d July following; and James Porter was executed in pursuance of this sentence.

Upon the 27th of May 1830 George Wilson withdrew the

pleas of *not guilty* in all the indictments against him, except those on which a nolle prosequi was afterwards entered, and pleaded *guilty* to the same.

The indictment for robbery of the Reading mail, and putting the life of the driver in jeopardy, upon which James Porter and George Wilson were tried and convicted, was in the following terms:

"Eastern district of Pennsylvania, to wit:

"The grand inquest of the United States of America inquiring for the eastern district of Pennsylvania, upon their oaths and affirmations, respectively do present, that James Porter, otherwise called James May, late of the eastern district aforesaid, yeoman, and George Wilson, late of the eastern district aforesaid, yeoman, on the 6th day of December in the year of our Lord one thousand eight hundred and twenty-nine, at the eastern district aforesaid, and within the jurisdiction of this court, with force and arms in and upon one Samuel M'Crea, in the peace of God and of the United States of America then and there being, and then and there being a carrier of the mail of the United States, and then and there entrusted therewith, and then and there proceeding with the said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him the said Samuel M'Crea in bodily fear and danger then and there feloniously did put, and the said mail of the United States from him the said Samuel M'Crea then and there, feloniously, violently and against his will, did steal, take and carry away, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

"And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit, on the same day and year aforesaid, at the eastern district aforesaid and within the jurisdiction of this court, with force and arms in and upon the said Samuel M'Crea, then and there being a carrier of the mail of the United States, and then and there entrusted therewith, feloniously did make an assault, and him the said carrier of the said mail then and there feloniously, violently, and against his will, did rob, contrary to the form of the act of congress in such case

made and provided, and against the peace and dignity of the United States of America."

On the 14th of June 1830 the president of the United States granted the following pardon to George Wilson:

"Andrew Jackson, president of the United States, to all who shall see these presents, greeting:

"Whereas a certain George Wilson has been convicted before the circuit court of the United States for the eastern district of Pennsylvania, of the crime of robbing the mail of the United States, and has been sentenced by the said court to suffer the penalty of death on the 2d day of July next; and whereas the said George Wilson has been recommended as a fit subject for the exercise of executive clemency by a numerous and respectable body of petitioners, praying for him a remission of the sentence of death, inasmuch as, in such a case, sentence of imprisonment for twenty years may yet be pronounced against him on the indictments to which he has pleaded guilty in the circuit court of the United States for the said district, and a still more severe imprisonment may be awarded him for the same acts, in the criminal courts of Pennsylvania:

"Now therefore, I, Andrew Jackson, president of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, have pardoned, and do hereby pardon the said George Wilson the crime for which he has been sentenced to suffer death, remitting the penalty aforesaid, with this express stipulation, that this pardon shall not extend to any judgment which may be had or obtained against him, in any other case or cases now pending before said court for other offences wherewith he may stand charged.

"[L. S.] In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed to these presents. Given at the city of Washington this 14th day of June, A.D. 1830, and of the independence of the United States the fifty-fourth.

"ANDREW JACKSON.

"By the President,

"M. VAN BUREN, *Secretary of state.*"

The record, as certified from the circuit court, proceeds to state:

"And now, to wit, this 20th day of October, A.D. 1830, the district attorney of the United States moves the court for sentence upon the defendant, George Wilson: but the court suggesting the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the president of the United States to the defendant since the conviction on this indictment, although alleged to relate to a conviction on another indictment, the case postponed till the 21st day of October 1830.

"And now, to wit, this 21st day of October 1830, the counsel for the defendant, George Wilson, appear before the court, and on behalf of the said defendant, waive and decline any advantage or protection which might be supposed to arise from the pardon referred to: and thereupon the following questions or points were argued by the district attorney of the United States, upon which the opinions of the judges of the said circuit court were opposed:

"1. That the pardon referred to (prout the same) is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court.

"2. That the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise.

"And now, to wit, this 21st day of October 1830, the defendant, George Wilson, being in person before the court, was asked by the court whether he had any thing to say why sentence should not be pronounced for the crime whereof he stands convicted in this particular case, and whether he wished in any manner to avail himself of the pardon referred to: and the said defendant answered in person, that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to.

"And the said judges being so opposed in opinion upon the points or questions above stated, the same were then and there, at the request of the district attorney of the United States,

stated under the direction of the judges, and ordered by the court to be certified under the seal of the court to the supreme court, at their next session thereafter, to be finally decided by the said supreme court. And the court being further of opinion that other proceedings could not be had in the said case without prejudice to its merits, did order the same to be continued over to the next sessions of the court.

"HENRY BALDWIN.
"JOS. HOPKINSON."

The case was argued for the United States, by Mr Taney, attorney-general; no counsel appeared for the defendant, George Wilson.

The attorney-general contended, that the other indictments against the defendant, and the proceedings on them, formed no part of the proceedings or evidence in this case; and they are not offered in evidence either by the United States or George Wilson. This court could judicially notice, perhaps, that such indictments were upon the records of the circuit court. But whether it was the same Wilson, or the act constituting the offence the *same act;* and whether it was pardoned; were matters of fact, and not matters of law. Neither one of these facts was pleaded by either of the parties, nor in any form alleged, nor any evidence offered to establish either of them.

The question is, can the court, without the allegation of either party, and without evidence offered, decide the facts, that he is the same person; that the act pardoned is the same with the one now charged; and that he has been pardoned for that act?

This is not a statute pardon. The pardoning power in the constitution is the executive power.

Waiving for the present the identity of the person and the act, and conceding that the pardon would discharge him, it is insisted:

1. That the court cannot give the prisoner the benefit of the pardon, unless he claims the benefit of it, and relies on it by plea or motion. The form in which he may ask it is not ma-

terial to this inquiry; but the claim must be made in some shape by him. It is a grant to him; it is his property; and he may accept it or not as he pleases.

The ancient doctrine was, that his plea of *not guilty* waived it, and that he could not afterwards rely on it: that a general plea of not guilty, was equivalent to a refusal to accept it.

This doctrine is not meant to be contended for. It is admitted that he may avail himself of it at any time by plea, before or after verdict or confession. But it is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle. 2 Hawk. ch. 37, sect. 59, 64, 65; 4 Bl. Com. 402; Arch. Plead. and Ev. 55; 5 Bac. Abr. 292, 293, tit. Pard. E.; Comyn's Dig.; 13 Petersd. Abr. 82; Kelynge, 24; Radcliffe's case, Fost. 40; 1 Wils. 150; King v. Haines, 1 Wils. 214; Jenk. Cent. p. 12, case 62.

The necessity of his pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it.

We must not look at a pardon as if confined to capital cases. It exists in cases of misdemeanours also; and the same rule applies to both, and the same effect is produced in both.

A pardon may be granted on a condition precedent or subsequent, and the party remains liable to the punishment if the condition is not performed. 2 Hawk. ch. 37, sec. 45; 3 Thom. Co. Lit. 569, 615, note (*m*), and the authorities; Patrick Maddan's case, 1 Leach's Cas. 220, 263; The People v. James, 2 Caines's Rep. 57; Radcliffe's case, Fost. Cr. Law, 41.

Suppose a pardon granted on conditions, which the prisoner does not choose to accept? Suppose the condition is *exile*, and he thinks the sentence a lighter punishment? Suppose he thinks it his interest to undergo the punishment, in order to make his peace with the public for an offence committed in sudden temptation?

A prisoner might be placed in circumstances, when he would feel it to be his interest to suffer imprisonment or pay a fine, as the evidence of his contrition. Might he not, under such

circumstances, refuse to accept a general and unconditional pardon?

It is hardly necessary to speculate on the case of a man refusing to accept a pardon in a capital case. It is an event not even *possible*, where the party was in his sound mind. If it should happen, without doubt there is a power in the executive to prevent the execution of the sentence.

But we are now discussing *judicial* power, which, being governed by fixed laws and rules of proceeding, cannot exercise a discretion beyond the limits which the law has prescribed. They cannot look to cases which may possibly arise. There is sufficient power in another branch of the government to prevent any evil from the principle insisted on. The argument is fortified by the clause introduced into the acts of amnesty in England. Radcliffe's case, Fost. 44, 45.

2. But suppose the prisoner is not bound to plead it. How was it before the court in any other form? The attorney for the United States did not call on the court to allow it. No evidence was offered of the identity of Wilson, or of the act pardoned. Radcliffe's case, Fost. Cr. Law, 43. The identity had been found by a jury. How did the court obtain a knowledge of the fact?

A man who has been acquitted, cannot lawfully be punished in another proceeding. So of a former conviction. Arch. Plead. and Ev. 50 to 54.

Suppose another indictment for the same offence, and the court saw the man, and heard the evidence, and knew it to be the same, could they direct a verdict of not guilty? The defence must be pleaded with the proper averments.

If the party by an oversight omitted it, no doubt the court would give him an opportunity of correcting the error. But if he refused to plead it, and the jury found him guilty, or he pleaded guilty, could the court discharge him? If they could not, how can they do it with a pardon, when the party refuses to avail himself of the defence. Yet a former acquittal absolves him from all the consequences of crime as perfectly as a pardon. It declares him innocent. The pardon restores him to innocence in the eye of the law.

A pardon may release a part of the penalty inflicted by law and reserve the other. A pardon may be granted on condition, as already shown. May it not then annex any condition? a condition that a party shall undergo a part of the punishment?

It may be on condition that he will leave the United States.

Why may it not be that he will pay the fine, where the punishment is fine and imprisonment? Why may it not be on condition that he undergoes the imprisonment? Why not that he undergoes part of the imprisonment? 3 Johns. Cas. 333, United States v. Lukens, Coxe's Digest, title Pardon, 510.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

In this case the grand jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards, he withdrew this plea, and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the president of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day the counsel for the prisoner appeared in court, and on his behalf waived and declined any advantage or protection which might be supposed to arise from the pardon referred to; and thereupon the following points were made by the district attorney:

1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court.

2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the court.

The prisoner being asked by the court whether he had any thing to say why sentence should not be pronounced for the crime whereof he stood convicted in this particular case, and whether he wished in any manner to avail himself of the par-

don referred to, answered that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to.

The judges were thereupon divided in opinion on both points made by the district attorney, and ordered them to be certified to this court.

A certiorari was afterwards awarded to bring up the record of the case in which judgment of death had been pronounced against the prisoner. The indictment charges a robbery of the mail, and putting the life of the driver in jeopardy. The robbery charged in each indictment is on the same day, at the same place and on the same carrier.

We do not think that this record is admissible, since no direct reference is made to it in the points adjourned by the circuit court: and without its aid we cannot readily comprehend the questions submitted to us.

If this difficulty be removed, another is presented by the terms in which the first point is stated on the record. The attorney argued, first, that the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court. Upon this point the judges were opposed in opinion. Whether they were opposed on the fact, or on the inference drawn from it by the attorney; and what that inference was; the record does not explicitly inform us. If the question on which the judges doubted was, whether such a pardon ought to restrain the court from pronouncing judgment in the case before them, which was expressly excluded from it; the first inquiry is, whether the robbery charged in the one indictment is the same with that charged in the other. This is neither expressly affirmed nor denied. If the convictions be for different robberies, no question of law can arise on the effect which the pardon of the one may have on the proceedings for the others.

If the statement on the record be sufficient to inform this court, judicially, that the robberies are the same, we are not told on what point of law the judges were divided. The only inference we can draw from the statement is, that it was

doubted whether the terms of the pardon could restrain the court from pronouncing the judgment of law on the conviction before them. The prisoner was convicted of robbing the mail, and putting the life of the carrier in jeopardy, for which the punishment is death. He had also been convicted on an indictment for the same robbery, as we now suppose, without putting life in jeopardy, for which the punishment is fine and imprisonment; and the question supposed to be submitted is, whether a pardon of the greater offence, excluding the less, necessarily comprehends the less, against its own express terms.

We should feel not much difficulty on this statement of the question, but it is unnecessary to discuss or decide it.

Whether the pardon reached the less offence or not, the first indictment comprehended both the robbery and the putting life in jeopardy, and the conviction and judgment pronounced upon it extended to both. After the judgment no subsequent prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded. Whether it could avail without being pleaded, or in any manner relied on by the prisoner, is substantially the same question with that presented in the second point, which is, "that the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise."

The constitution gives to the president, in general terms, "the power to grant reprieves and pardons for offences against the United States."

As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the

individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

Is there any thing peculiar in a pardon which ought to distinguish it in this respect from other facts?

We know of no legal principle which will sustain such a distinction.

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanours. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.

The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court by plea, motion or otherwise."

The decisions on this point conform to these principles. Hawkins, b. 2 ch. 37, sect. 59, says, "but it is certain that a man m[illegible] have the benefit of a pardon under the great seal, as where one who hath such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the

pardon." In sect. 67, he says, "an exception is made of a pardon after plea."

Notwithstanding this general assertion, a court would undoubtedly at this day permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal.

Hawkins says, sect. 64, "it will be error to allow a man the benefit of such a pardon unless it be pleaded." In sect. 65, he says, "he who pleads such a pardon must produce it *sub fide sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the property of it belongs to him.

Comyn, in his Digest, tit. Pardon, letter H, says, "if a man has a charter of pardon from the king, he ought to plead it in bar of the indictment; and if he pleads not guilty he waives his pardon." The same law is laid down in Bacon's Abridgement, title Pardon; and is confirmed by the cases these authors quote.

We have met with only one case which might seem to question it. Jenkins, page 169, case 62, says, "if the king pardons a felon, and it is shown to the court, and yet the felon pleads guilty, and waives the pardon, he shall not be hanged; for it is the king's will that he shall not, and the king has an interest in the life of his subject. The books to the contrary are to be understood where the charter of pardon is not shown to the court."

This vague dictum supposes the pardon to be shown to the court. The waiver spoken of is probably that implied waiver which arises from pleading the general issue: and the case may be considered as determining nothing more than that the prisoner may avail himself of the pardon by showing it to the court, even after waiving it by pleading the general issue. If this be, and it most probably is the fair and sound construction of this case, it is reconciled with all the other decisions, so far as respects the present inquiry.

Blackstone, in his 4th vol. p. 337, says, "a pardon may be pleaded in bar." In p. 376, he says, "it may also be pleaded in arrest of judgment." In p. 401, he says, "a pardon by act

of parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must, *ex officio*, take notice of it; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution."

The reason why a court must ex officio take notice of a pardon by act of parliament, is that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or annulled.

This court is of opinion that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion or otherwise, cannot be noticed by the judges.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the third circuit and eastern district of Pennsylvania, and on the question on which the judges of that court were divided in opinion, and was argued by the attorney-general on the part of the United States: on consideration whereof, this court is of opinion that the pardon alluded to in the proceedings, not having been brought judicially before the court by plea, motion or otherwise, ought not to be noticed by the judges, or in any manner to affect the judgment of the law. All which is directed and adjudged to be certified to the judges of the said circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES v. SAMUEL BREWSTER.

Indictment founded on the eighteenth section of the act of congress, passed on the 15th day of April 1816, entitled "an act to incorporate the subscribers to the Bank of the United States."

The indictment charged the defendant with uttering and forging "a counterfeit bill in imitation of a bill issued by the president," &c. of the bank. The forged paper was in these words and figures:

(5) F 745 F 745 (5)
Cashier of the
Bank of the United States,
Pay to C. W. Earnest, or order, five dollars
Office of Discount and Deposit in Pittsburgh, the 10th day of Dec. 1829.
A. BRACKENRIDGE, Pres.
J. CORREY, Cash.
Fairman, Draper, Underwood & Co.
(Indorsed) Pay the bearer,
C. W. EARNEST.

Held, that a genuine instrument, of which the forged and counterfeited instrument is an imitation, is not *a bill* issued by order of the president, &c. of the Bank of the United States, according to the true intent and meaning of the eighteenth section of the act incorporating the bank.

ON a certificate of division of opinion from the circuit court of the United States for the eastern district of Pennsylvania.

At the circuit court in October 1832, an indictment was found against the defendant, containing two counts.

The first, that on the 8th day of May 1832, he unlawfully and feloniously did sell, utter and deliver a false, forged and counterfeited bill, in imitation of *a bill* issued by order of the president and directors of the Bank of the United States, which said false, forged, and counterfeited bill, partly written and partly printed, is in the words and figures following, to wit:

(5) F 745 F 745 (5)
Cashier of the
Bank of the United States,
Pay to C. W. Earnest, or order, five dollars
Office of Discount and Deposit in Pittsburgh, the 10th day of Dec. 1829.
A. BRACKENRIDGE, Pres.
J. CORREY, Cash.
Fairman, Draper, Underwood & Co.
(Indorsed) Pay the bearer,
C. W. EARNEST.

with intent to defraud the president, directors and company of the Bank of the United States; he, the said Samuel Brewster, otherwise called Samuel B. Brewster, at the time he so sold, uttered and delivered the said false, forged and counterfeited *bill* as aforesaid, then and there well knowing the same to be false, forged and counterfeited, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

The second count charged that the defendant did sell, utter and deliver, and did cause to be sold, uttered and delivered, a false, forged and counterfeited note, in imitation of and purporting to be a note issued by order of the president and directors of the Bank of the United States, which said last mentioned false, forged and counterfeited note, partly written and partly printed, was in the words and figures following, to wit [describing it in the same form as in the first count]: with intent to defraud the president, directors and company of the Bank of the United States; he, the said Samuel Brewster, otherwise called Samuel B. Brewster, at the time he so sold, uttered and delivered the said false, forged and counterfeited note as aforesaid, then and there well knowing the same to be false, forged and counterfeited, contrary to the form of the act of congress in such case made and provided, &c.

To this indictment, the prisoner pleaded not guilty; and, upon the trial, the following question occurred, upon which the opinions of the judges of the circuit court were opposed.

Whether the genuine instrument of which the said false, forged and counterfeited instrument is in imitation, is *a bill* issued by order of the president and directors of the said bank, according to the true intent and meaning of the eighteenth section of the act of congress, passed on the 16th day of April in the year of our Lord 1816, entitled "an act to incorporate the subscribers of the Bank of the United States."

And the said judges being so opposed in opinion upon the question aforesaid, the same was then and there, at the request of the district attorney for the United States, stated under the direction of the judges, and ordered by the court to be certified, under the seal of the court, to the supreme court, at their next session to be held thereafter, to be finally decided by the said

supreme court; and the court being further of opinion that further proceedings could not be had in said cause without prejudice to the merits of the same cause, did order that the jury empannelled as aforesaid to try said cause, be discharged from giving any verdict therein.

The case was presented to the consideration of the court by Mr Taney, attorney-general. The defendant did not appear by counsel.

Mr Taney said:

The indictment was found under the provisions of the act of April 10th, 1816, sect. 18, incorporating the Bank of the United States. The offence charged in the first count is selling "a counterfeit bill;" in the second count the offence alleged is selling "a counterfeit note."

Under the provisions of the law the "note" or "bill" counterfeited, must be one issued "by order of the president and directors of the bank;" but this is not such *a bill*. It is drawn by the president and cashier of the branch bank of Pittsburgh on the mother bank at Philadelphia.

The attorney-general submitted the case to the court, after stating the sections of the bank charter which refer to "bills," "notes," and "bills of exchange," thus showing that the "notes" of the bank, and "bills of exchange" are not the same; while upon other words used in the eighteenth section, the offence charged against the defendant might have been the foundation of an indictment, the court would decide whether in this case as a "bill" or "note," the draft set forth in the indictment was properly described. He also cited 10 Petersd. 44; 2 East's Cr. Law, 876; 10 Petersd. 51.

The following certificate was directed to be issued to the circuit court.

On a certificate of division in opinion of the judges of the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern

district of Pennsylvania, and on the question and point on which the judges of that court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel: on consideration whereof, this court is of opinion, that the genuine instrument, of which the said false, forged and counterfeited instrument, in the certificate of division mentioned, is in imitation, is not a bill issued by order of the president, directors and company of the Bank of the United States, according to the true intent and meaning of the eighteenth section of the act of congress, passed on the 16th day of April in the year of our Lord one thousand eight hundred and sixteen, entitled, "an act to incorporate the subscribers of the Bank of the United States:" whereupon it is ordered and adjudged by this court, that it be certified to the said circuit court of the district of Pennsylvania, that the genuine instrument, of which the said false, forged and counterfeited instrument in the certificate of division mentioned is in imitation, is not a bill issued by order of the president, directors and company of the Bank of the United States, according to the true intent and meaning of the eighteenth section of the act of congress, passed on the 16th day of April in the year of our Lord one thousand eight hundred and sixteen, entitled, "an act to incorporate the subscribers of the Bank of the United States."

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FARMERS BANK OF ALEXANDRIA v. JOHN HOOFF ET AL.

R. being indebted to the Farmers Bank of Alexandria, on certain promissory notes exceeding in amount one thousand dollars, conveyed to H. a lot of ground in Alexandria, exceeding one thousand dollars in value, devised to her by her husband, to secure the payment of the said notes by sale of the lot. R. claimed an estate in fee in the property conveyed to the trustee. The sum due to the bank was reduced by payments to less than one thousand dollars, and R. being deceased, a bill was filed by the bank to compel the trustee to sell the property conveyed to him by R. for the payment of the balance of the debt. The circuit court decreed that R. held no other interest in the property than a life estate, and dismissed the bill. The complainants appealed.

On a motion to dismiss the appeal for want of jurisdiction, the debt remaining due to the bank being less than one thousand dollars, the amount required to give jurisdiction in appeals and writs of error from the circuit court of the district of Columbia; it was held that the real matter in controversy was the debt claimed in the bill; and though the title of the lot might be inquired into incidentally, it does not constitute the object of the suit. The appeal was dismissed.

ON appeal from the circuit court of the United States of the district of Columbia for the county of Alexandria.

In the circuit court of the county of Alexandria the appellants filed a bill setting forth that a certain Mary Resler being indebted to the Farmers Bank of Alexandria, as drawer of certain promissory notes, amounting to one thousand two hundred and sixty-seven dollars, which notes were renewed and were afterwards reduced by payments, in order to secure the payment of the sum remaining due to the bank on the 10th of September 1823, made and executed a deed to John Hooff, one of the defendants, by which certain real estate in the city of Alexandria was conveyed to him in trust to secure the payment of the amount due on the said notes. The title of Mary Resler to the property so conveyed, was derived from the will of her deceased husband; and the bill claims that she took a fee simple in the property, to be defeated by her marrying again, and she having died without marrying, the property is liable to her debts.

The bill proceeds to state, that James Galt and others, also

appellees, contend that Mary Resler took, under the will of her husband, no more than a life estate in the property so conveyed in trust; and that John Hooff, the trustee, declines making a sale of the property to satisfy the debt due to the appellants.

The bill asks a discovery of the asserted title of the appellees, that the equity of redemption set up by the appellees may be foreclosed, and that the trustee be decreed to sell the premises. The bill also asks for an account from the administrator of Mary Resler.

The answer of John Galt, one of the appellees, denies the title of Mary Resler in the property conveyed by the deed of trust to have been a fee simple in her; and asserts that the fee in the same descended to the respondent and to his brothers, and asserts that Mary Resler took no more in the premises, under the will of her deceased husband, than an estate for life.

The circuit court, being of opinion that Mary Resler took no more than an estate for life under the will of her deceased husband; and conveyed to the appellant, by the deed, no more than such an estate, dismissed the complainant's bill. From this decree the appellants appealed to this court.

Mr Fendall moved to dismiss the appeal; this court having no jurisdiction to entertain an appeal, unless the sum in controversy exceeds one thousand dollars.

It was admitted that the debt due to the bank from Mary Resler, at the time the bill was filed, did not exceed seven hundred dollars; and an affidavit was exhibited to the court to prove the estate held by the trustee exceeded one thousand dollars in value.

Mr Fendall cited Columbian Insurance Company v. Wheelwright, 7 Wheat. 534; Oldgrant, on the demise of Meredith v. M'Kee, 1 Peters, 248; and Ritchie v. Mauro, 2 Peters, 248.

He contended that the only amount in controversy was the sum due to the appellants. It is the beneficial amount; that which will result to a party in the event of the suit, which gives jurisdiction

Mr Lee, contra, argued that the title to the estate conveyed

to the trustee was the question in the court, and this court would look alone to the value of the estate.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This is a motion to dismiss an appeal from a decree of the court of the United States for this district, sitting in the county of Alexandria; because the matter in controversy does not amount to one thousand dollars.

The bill was filed for the purpose of obtaining a decree for the sale of a lot, on which a deed of trust had been given to secure the payment of a sum of money amounting with interest to less than one thousand dollars. The bill was dismissed, and from this decree an appeal was taken.

The appellant alleges, in support of the jurisdiction of the court, that the real question is, whether the debtor be entitled to the lot, and as that is worth more than one thousand dollars, this court may take jurisdiction, though the sum claimed in the bill is less.

The court is of a different opinion. The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit.

The appeal is dismissed.

JOHN HOLMES, MICHAEL OMEALY, RICHARD CATON, HUGH THOMPSON, AND WILLIAM SLATER, APPELLANTS v. DANIEL TROUT, WILLIAM MORELAND, WALTER MORELAND, JEREMIAH TROUT, JACOB OVERPECK, AND WILLIAM BUCHANNAN, APPELLEES.

Questions on the validity of certain entries of lands in the state of Kentucky.

A survey itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformable to the entry, and the entry can be sustained, the call for the survey may support an entry. The boundaries of the survey must be shown. This principle is fully settled by the decisions of the courts of the state of Kentucky.

It has been a settled principle in Kentucky that surplus land does not vitiate an entry, and a survey is held valid if made conformably to such an entry.

The principle is well settled, that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just.

Until an entry be surveyed, a subsequent location must be governed by its calls; and this is the reason why it is essential that every entry shall describe with precision the land designed to be appropriated by it. If the land adjoining to the entry should be covered by a subsequent location, it would be most unjust to sanction a survey of the prior entry beyond its calls, and so as to include a part of the junior entry.

The locator may survey his entry in one or more surveys, or he may, at pleasure, withdraw a part of his entry. When a part of a warrant is withdrawn, the rules of the land office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn.

In giving a construction to an entry, the intention of the locator is to be chiefly regarded, the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage, on the ground that it was made through mistake; but if a call be made for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for to control a rectangular figure, that form shall be given to the survey.

No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying a record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but, in such a case, it must appear from the record that the evidence was used or offered to the circuit court.

Under the laws of Kentucky, the cancelling of a deed does not re-invest the title in the grantor.

[Holmes and others v. Trout and others.]

APPEAL from the circuit court of the United States for the district of Kentucky.

In the circuit court, the appellants filed their bill in November 1815, setting forth a title to ten thousand acres of land derived under an entry made by Edward Voss, on the 11th of October 1783, upon which patents duly issued, and charging that the defendants were in possession of the said lands claiming title under entries made subsequent to that of Edward Voss. The bill prayed a discovery, that the defendants may be decreed to convey to the complainants their respective claims, to render possession of the land withheld, and for other and further relief.

After various proceedings in the case, by amended bills and otherwise, from 1815, the circuit court, at May term 1829, gave the following opinion and decree:

The complainants state in their bill that "Edmund Voss, on the 11th day of October 1783, made, with the surveyor of the proper county, the following location: Edward Voss enters ten thousand acres by virtue of two treasury warrants, Nos. 8991 and 8990, beginning at the north west corner of Patton's eight thousand four hundred acres survey; thence, with Allen's line, westwardly to the river, and along Roberts's line on the east for quantity; also, five thousand acres by virtue of treasury warrant, No. 8989, beginning at the south west corner of Patton's eight thousand four hundred acres survey, then westwardly with Patton, Pope and Thomas's survey; thence up the river, and on Patton's line on the east, for quantity." That surveys having been duly executed on said entries, the same were assigned to a certain Peyton Short, to whom patents were issued bearing date the 12th and 14th days of March 1790; that, on the 10th day of December 1796, Short conveyed to John Holmes, by deed, his whole claim to the land in controversy, but that, by contract, it is now jointly held by the said Holmes and the other complainants; and that the above deed is held for their joint benefit. The complainants further state that conflicting entries have been made by different persons since their location on the same land, and elder patents obtained; and they pray that a conveyance may be decreed to them on the ground of their prior equity. In their answers,

the defendants deny the equity set forth in the complainants' bill; and, having the elder legal title founded upon valid entries and surveys, they pray that the bill may be dismissed. Since the commencement of the present term, the complainants have filed an amended bill, stating that the whole of the land in contest was purchased for the use and benefit of Holmes, Slater, Caton and Omealy; and that, subsequently, by the consent of Caton and Slater, Omealy became their trustee; that an agreement was entered into between the complainants and a certain John Breckenridge deceased, by which he undertook to render certain services, for which he was to have one moiety of the land; that the original deed to Holmes, never having been recorded, was handed to said Breckenridge, with other papers relating to the business, and with directions to Short to make a deed to the complainants and Breckenridge; that the said Breckenridge was in possession of the deed to Holmes, and authorized to receive a conveyance from Short to himself; and the complainants agreed with Short to cancel the deed to Holmes, which was done by delivering it to Short, who cancelled it by erasing his name, and a new deed was made by him to Breckenridge, and to William Omealy as trustee for John Holmes and William Slater, and to Hugh Thompson, as trustee for Richard Caton, bearing date 21st day of September 1804. The amended bill further states that Breckenridge departed this life in 1806, before his part of the contract was performed, and that a bill was filed against his heirs by the complainants for a re-conveyance of the land; that, on the final hearing of this case, the court decreed that, as Breckenridge had but in part performed his contract, the deed should be cancelled as to all the lands within two adverse claims, to wit: that of the defendant Howard and Williams or Brown; and the complainants were decreed to convey to Breckenridge's heirs one moiety outside of these claims; in pursuance of this decree, deeds were executed. The complainants state that the whole of the land in controversy is included in John Howard's claim, under which the defendants claim, and is referred to in the deed from Breckenridge's heirs to them: and that, since the date of such deed, the equitable title has been vested in them. To the amended bill Jeremiah Trout, Daniel

Trout, William Buchannan, Jacob Overpeck, John Moreland, Walter A. Moreland and William Moreland, defendants, answer, that they, with those under whom they claim, have been in the actual occupancy and peaceable possession of all the land claimed by them, in their former answers, for upwards of twenty years before the filing of the amended bill, and they deny the statements contained in it. On filing the amended bill, the parties agreed that the suit should progress in the names of the parties to the record, and that no advantage should be taken on account of the death of either of the parties since the pendency of the suit; and that the decree should be as valid as if the heirs of any such party were before the court. It was also agreed that John Howard entered on the land in controversy, by virtue of his claim of seven thousand nine hundred and forty-five and a half acres, by his tenants, and within the claim of C. Clarke; that the entry was within the boundary of said Clarke, and that Howard's claim wholly covered the claim of Clarke; that this entry was made in the year 1804, and continued, without interruption, adverse to the claim of Voss and Short, set up by the complainants, until the year 1813, when Howard, in an action of ejectment, by virtue of Clarke's claim, was evicted, and possession taken by William Moreland, deceased, a purchaser from Clarke; and that such possession was continued by said Moreland until his death, and that his devisees have remained in the possession adverse to the complainants ever since. It was admitted that Daniel Trout, deceased, in the year 1808, purchased the claim of Daniel and Hite's six hundred acres within the tract claimed by complainants, and, at that time, by his two sons, Daniel and Jeremiah, entered into the possession, which is still continued; that the defendants, Overpeck and Buchannan, in the year 1818, entered into the possession of the above tract, under the said Daniel and Jeremiah, and have resided on it until the present time; all of whose possessions are adverse to the complainants. The grant to Daniel and Hite is admitted to be elder in date than Howard's or any other interfering claim; Clarke's grant is elder than Howard's, and Short's bears date after Howard's. As the defendants possess the elder grant, the complainants must rely on their prior equity, and, to show

this, they endeavour to sustain the entry of Voss, under which they claim. This entry calls to begin at the north west corner of Patton's eight thousand four hundred acres survey, and for Allen and Roberts's line. Patton's entry was made on the 26th December 1782, for eight thousand four hundred acres, upon a treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen Mile creek, beginning at a tree marked J. P., to run north five miles, then to extend off at right angles for quantity: this entry was surveyed on the 20th September 1783, and calls to begin at a mulberry, elm and sugar tree, marked J. P., standing on the bank of the first large creek running into the Ohio above the Eighteen Mile creek, two miles up the said creek. On the 11th October 1783, John Allen entered one thousand acres, part of a treasury warrant, No. 14,198, beginning at the north west corner of Patton's eight thousand four hundred acres survey, and running with his line south two hundred and fifty poles, thence down the creek on both sides westwardly for quantity, to be laid off in one or more surveys. Roberts's entry was made on the 26th December 1782, the same day Patton's entry was made. It is argued by the counsel for the defendants, that Patton's entry, on which Voss's entry depends, is void for want of certainty and notoriety in its calls. The depositions of several witnesses have been read to sustain this entry. William Meriwether swears that Eighteen Mile creek was known previous to the year 1782, and that Patton's creek is the first one running into the Ohio above Eighteen Mile creek, except Bell's spring branch, which is not much more than a mile in length; that Patton's creek was so called from the time the above entry was made, and was generally pretty well known by that name as early as October 1783. He does not recollect the year he became acquainted with the tree marked J. P., but he thinks, within a year or two after the entry was made, he was at the tree, about two miles up Patton's creek, lacking forty poles, in company with persons who were about purchasing Patton's entry. The letters J. P. were very large, and marked on a mulberry tree standing near the creek; that Patton informed him of the entry shortly after it was made, and that he had marked the tree, and run one of the lines before the entry was

made. He states that, from the appearance of the tree, he has no doubt of its having been marked at the time as represented by Patton. He further states, he thinks it would be almost impossible for any person to have searched for the tree without finding it, after finding the beginning corner of Patton's entry and survey; it would not be difficult, he states, for a subsequent locator to find the north west corner by tracing the line; that he has traced this line several times to the corner, on the top of a hill at a sugar tree and two ashes, which were plainly marked. At the beginning corner of Patton's survey, the witness states there was an appearance of a large encampment, and several trees were marked, some with the letters J. P., and others with the initials of his own name; and that the trees about the place were much chopped. Benjamin Roberts states that he believes Eighteen Mile creek has been generally known since the year 1780, and that he saw it in 1783; that Patton's creek is the first one of any notoriety running into the Ohio above the Eighteen Mile creek: and it was generally known by that name in the spring of the year 1783. He thinks that a good woodsman, by searching up the creek agreeably to the calls of Patton's entry, could have found his beginning corner. Joseph Saunders states that he knew Eighteen Mile creek in June 1780; that Patton's creek is the first creek of any note above Eighteen Mile creek, and its name was derived from the entry of Patton. He states that, in May 1783, Patton showed him a mulberry tree marked J. P. standing on the bank of Patton's creek, about two miles from the mouth, and said it was his beginning corner; the letters J. P. were large, and appeared to have been marked with a tomahawk; and the witness thinks the tree might have been found by any one searching for it. Several other witnesses were acquainted with Patton's entry at an early period, and with its principal calls, but not until some years after it was made. No doubt can exist that the Eighteen Mile creek was notorious at the time the entry was made, and that the branch called for is the one known by the name of Patton's creek; between this creek and the Eighteen Mile creek there are one or two small branches, neither of which could be taken for the call in the entry: but it is objected to the entry, that the call, "about

two miles up the first branch," is not sufficiently definite to direct a subsequent locator to the marked tree; that the side of the creek on which this tree stands is not designated, nor its distance from the creek; and that, by actual measurement on a straight line from the mouth of the creek, the distance to the tree falls forty poles short of two miles. It is also contended, by the calls of the entry, it would seem to have been the intention of the locator that the body of the land should be about two miles up the creek, rather than that point should constitute his beginning corner. This objection seems not to be well taken: the words of the entry are, James Patton enters eight thousand four hundred acres, &c. about two miles up the first branch above the Eighteen Mile creek, beginning at a tree marked J. P.; and no one, it is believed, could mistake these calls, or hesitate to conclude that the tree marked was the beginning corner: from this corner the entry calls to run five miles north, &c. The rule which governs in the construction of entries has been long fixed, and if this were not the case, it would obviously result from circumstances. Entries were made at an early day, by individuals who were more acquainted with the stratagems of savage warfare than the precision of language. They were better hunters than critics: entries must be construed by the popular signification of the words used, rather than by the grammatical arrangement of sentences. If the intention of the locator can be satisfactorily ascertained from the calls of his entry, it must be sustained. The call to run up the creek, in popular signification, directs the inquirer to follow the stream: as the Eighteen Mile creek is below Patton's creek, any person beginning his search at that point for the marked tree, would trace the Ohio to Patton's creek, and would naturally seek for the marked tree on the lower side, about two miles from its mouth; but it would not be unreasonable to require a search on both sides of the creek. This search would somewhat increase the labour of a subsequent locator, but it would scarcely lessen the probability of finding the object. No witness saw the tree when it was marked, but Meriwether saw it one or two years afterwards; and, from the appearance of the letters J. P., he seems to have no doubt that they were made at the time Patton represented them to have

been made. Saunders saw these letters in 1783, and the tree was pointed out to him by Patton, as his beginning corner: this was within five months after the entry was made, and several months before the entry of Voss. Several witnesses state that the beginning of Patton's entry could be found by observing its descriptive calls. The variation of forty poles, on a straight line, from the distance called for in the entry, is not considered very material. The circumstances under which this entry was made, would authorize no one to expect greater accuracy: forty poles more or less than the exact distance of two miles, is a sufficiently limited range for a subsequent locator. Under all the facts established, the court are of opinion that the entry of Patton is shown to possess all the requisites of a valid entry: this entry was surveyed on the 20th of September 1783, twenty days before the entry of Voss. Voss's entry calls for the survey of Patton, though it does not appear at that time to have been recorded; the north west corner of this survey, which is the beginning called for in Voss's entry, could easily be found by tracing the line from Patton's beginning corner; any variation in the length of this line, from the calls of the entry, cannot be material as to the defendants' entry, as the distance is controlled by the marked corner proved to have been made. The other calls in the entry of Voss are believed to be sufficiently certain to enable the holder of a warrant to locate the adjacent land; and that is a substantial compliance with the requisitions of the land law.

The other entry of Voss for five thousand acres, which calls to begin at the south west corner of Patton's eight thousand four hundred acre survey, contains all the requisites of a valid entry. To show a title from the patentee, a deed, bearing date the 10th day of December 1796, from him to John Holmes for thirteen thousand five hundred acres, is given in evidence. The signature of the grantor in this deed has been erased, apparently with the view of cancelling it; but it is contended that, if such an inference can arise from the erasure, that it does not re-invest the fee in the grantor; that this can only be done by the solemnities of a deed duly executed. One of the subscribing witnesses to this deed, whose deposition is introduced to prove its execution, states that he was written

to by Short, to endeavour to make sales of the land for him; that, upon being told by Holmes what was the best he could do with it, the witness advised him to sell it, and told him that he thought Short would be satisfied; and the witness understood the land was sold. The witness states that, from his letter book, this deed appears to have been forwarded by him to Holmes, on the 3d of January 1797. A letter from Short to Holmes, dated 29th September 1794, in which he proposes to sell the lands at a certain price, is read in evidence. This letter, however, treats Holmes as an agent to sell the land, and not in the light of a purchaser. An obligation signed by Short, dated 10th December 1796, is also in evidence. In this obligation, Short states that he "has executed a deed to Holmes, of that date, for two certain tracts of land, containing thirteen thousand five hundred acres, which said deed is deposited in the hands of W. Morton of Lexington; and that, should Holmes be dissatisfied with the warranty given in said deed, and it is not in pursuance of the *meaning and intention* of the above letter, he agrees to enter into such an instrument of writing. From the whole of this evidence, it would seem to authorize the conclusion that the deed executed to Holmes was only designed to enable him to sell and make titles to the lands for the benefit of Short: but, if any doubt remained on the subject, it is removed by a subsequent deed executed by Short for the same lands to Holmes and others, without any reference to the former deed, and by the amended bill of the complainants, who state that the first deed was cancelled by agreement between Breckenridge and Short, and that they claim title under the one subsequently executed. The first deed, though absolute upon its face, was intended to make Holmes a trustee for the use of Short: and the court can have no difficulty, under the circumstances, in considering it a nullity so far as it relates to the present controversy: this deed has never been recorded, nor does it seem to have been treated by the parties as a valid instrument. There is no satisfactory proof of its delivery. From all the facts, it appears most probable, that it was forwarded to Breckenridge by Caton or some other person, and that it was never in the possession of Holmes, or intended to be delivered to him. By a letter, dated 13th of

January 1803, Holmes, by his trustee Omealy, requested W. Morton to surrender the deed to Breckenridge, who was authorized to receive a conveyance of the land from Short. The complainants must rely upon their conveyance from Short, dated 21st day of September 1804. This deed conveys to John Omealy, trustee for John Holmes and William Slater, and to H. Thompson, trustee of Richard Caton, and to John Breckenridge, the tracts of land let forth in the bill.

From the amended bill it appears that Breckenridge was entitled to one moiety of the entire claim as a compensation for certain services to be rendered by him; that he died before the services were completed; and that the complainants filed their bill against his heirs, and obtained a decree that cancelled the deed to certain parts of the land, which, in pursuance of such decree, were conveyed by the heirs of Breckenridge to the complainants. A question is here made by the defendants' counsel, whether the title set up by the complainants, in their amended bill, being different from that stated in the original bill, is not in fact the commencement of a new suit, and, consequently, gives to the defendants a right to insist on the statute of limitations in bar to the complainants' right of recovery. If such shall be the effect of the title set forth in the amended bill, it is agreed between the parties that advantage may be taken of it. In the first bill filed, the title is stated to have been derived from Short, the patentee to Holmes, with whom contracts were made by the other complainants for certain interests in the land. The amended bill sets up a title, by deed, from Short to John Omealy, trustee for John Holmes and William Slater, and to H. Thompson, as trustee for Richard Caton, and to John Breckenridge. Between these derivations of title in law there is an essential variation, but not in equity. The equitable interests of the parties may be the same under both deeds. In the first bill, the complainants state that, although the title was acquired, and is held by Holmes from Short, yet, by contracts with said Holmes, the estate is their joint property, and that Holmes held it for their use: such an alteration in this bill, as to state the deed to have been made by Short to the complainants instead of to Holmes, does not change the complainants' equity, and cannot be con-

sidered as the institution of a new suit. The case is however different, so far as it respects the interest of the complainants under the decree against the heirs of Breckenridge. A conveyance from them to the complainants of a part of the land conveyed by Short to their ancestor, was decreed on the ground that the consideration had, in part, failed. Breckenridge died before the services he agreed to render were fully performed. In the deed to him there was no reservation or condition. It was only by the aid of a court of chancery that the right of the complainants would be established and enforced against a part of the land. Until the decree which cancelled the deed was pronounced, the complainants possessed no claim, in law or equity, to the land in question, which could be rendered effective against the claim of the defendants. To the decree, therefore, must the complainants look for the origin of their claim to the land.

This decree was obtained in November 1822; and, for the first time, a claim is set up under it in the amended bill. Under the agreement of the parties, this part of the bill must be considered as the substitution of a distinct right, essentially different from any pretence of claim contained in the first bill; and, consequently, cannot be considered in a more favourable point of view, as to the statute of limitation, than the assertion of the same right in a bill filed at the present term. It will follow, therefore, that the title to the land conveyed to the complainants, under the decree against the heirs of Breckenridge; so far as it covers the land which has been occupied by the defendants, and those under whom they claim, adversely to the complainants, for twenty years before the filing of the amended bill; in law and equity, is vested in the defendants. The balance of the tract claimed by the defendants within the entry of Voss, must be relinquished to the complainants, as they hold the prior equity. The interfering claims will limit Voss to the calls of his entry, but the surveys are not protracted in such a manner as to enable the court satisfactorily to designate the boundaries of the parties as fixed by this decision. Unless, therefore, the parties, from their local knowledge of the land, shall be able to lay down the interferences, it may be necessary to direct a survey.

And afterwards, to wit, on a subsequent day of the term and year last aforesaid, to wit, the May term 1829, the court do order and decree that Jonathan Taylor, surveyor of Oldham county, do lay off the land in controversy, by beginning at James Patton's north west corner, designated on the connected plat, and lay down James Allen's entry of one thousand acres, running from said corner with patent line, south two hundred and fifty poles, and at right angles for quantity, and also lay down said entry by running from the base line, so that the lower line will cross Barebone creek the same distance that the base line crosses it: from Patton's northwest corner of said Allen, with said lines, parallel to the several courses of the creek, within the said Allen's survey, when so made; and if Barebone will not be included within the survey of Allen, when so made, the survey will be so varied as to make the creek pass out of the lower end of the survey as near to the point of distance that strikes the upper line as the general course of the stream within the survey will admit, to include both sides of the stream. That he then lay down John Roberts's entry, by running the first line thereof six miles parallel to the general course of the Ohio river, from where a due west line from Patton's corner to the river will strike it, to a point six miles on said river when reduced to a straight line; that he then lay off Voss's entry of ten thousand acres by first running a due west line to the river, and, on the course of Roberts's line, until the quantity of ten thousand acres of land is obtained; and then the course of Allen's west line, when laid down parallel to Barebone, until it strikes the river; and then up the river, and with the course of Roberts's line as before directed. And that he then ascertain, by metes and bounds, the interference between the complainants' entry, when surveyed in each position, and the defendants' surveys. And the court do further order and direct that the surveyor aforesaid survey and lay down the said claims in any or additional positions which either party may direct, and make report to the court, to enable the court to make a final decree.

Afterwards, at May term 1830 of the circuit court, the following final decree was given by the court:

"The surveyor having made his report in pursuance to the

interlocutory decree of this court, the court do decree and order that the defendants, John Moreland, William Moreland, and Walter Moreland, convey to the complainants, with special warranty, one half or moiety of so much of Christopher Clarke's survey of four hundred acres, as is included within the line designated on the surveyor's report by the letter C, and figure 2, and the original lines of Clarke's survey below or south of said line. And the court do further decree and order that the said defendants and complainants make partition of the same; and that the said Jonathan Taylor, the surveyor, divide and partition the same as nearly equal in quantity and value as is practicable; and that he report to this court, for their approval, the metes and bounds of the moiety allotted to the complainants. And the court do further decree and order that the said defendants, John Moreland, William Moreland, and Walter Moreland, pay to the complainants their costs herein expended. And the court do decree and order that so much of the bill as seeks redress against the defendants within the claim of Daniel and Hite, to wit, Daniel Trout, Jeremiah Trout, Jacob Overpeck, and William Buchannan, be dismissed, and that the complainants pay to them their costs. And the court do order and decree that the suit, as to the other defendants named in the bill, be continued."

From this decree the complainants appealed to this court.

The case was argued by Mr Wickliffe, for the appellants; and by Mr Loughborough, for the appellees.

Mr Wickliffe, for the appellants.

This is an appeal from a decree of the circuit court of the United States, for the district of Kentucky. The history of the case is accurately detailed in the opinion of the court, so far as that detail is given.

The decree recites the entries relied on accurately. They are as follows: viz.

December 26th, 1782. James Patton enters eight thousand four hundred acres upon treasury warrant No. 12,511, about two miles up the first branch, above the Eighteen Mile creek.

Beginning at a tree marked J. P. and to run north five miles, then to extend off at right angles eastwardly, for quantity.

December 26th, 1782. John Roberts enters ten thousand acres on treasury warrant No. 14,224. Beginning at the upper corner next the river of James Patton's entry of eight thousand four hundred acres, and to run parallel with the river six miles, then off at right angles eastwardly for quantity.

October 17th, 1783. James Allen enters one thousand acres, part of treasury warrant No. 14,198. Beginning at the north west corner of James Patton's eight thousand four hundred acres survey, and running with his line south two hundred and fifty poles, thence down the creek on both sides westwardly for quantity. To be laid off in one or more surveys.

October 11th, 1783. Edward Voss enters ten thousand acres by virtue of two treasury warrants Nos. 8991 and 8990. Beginning at the north west corner of Patton's survey of eight thousand four hundred acres; thence with Allen's line westwardly to the river; thence up the river, and along Roberts's line on the east, for quantity.

Patton's survey bears date the 20th day of September 1783, and calls to begin at a mulberry, elm and sugar tree marked I. P. standing on the bank of the first large creek; thence north one thousand six hundred poles, cornering at a sugar tree and two ashes, on the top of a hill, &c.

Of the validity of the entry of Voss, scarcely a rational doubt can be entertained. Patton's survey was, in fact, made before the date of the entries of Allen and Voss, and is most remarkable for its description. It not only gives the beginning given by the entry, and the course of the first line and the corner trees, but describes the corner as standing on "*the top of a hill.*" The court of appeals of Kentucky has in numerous cases decided, that in searching for the survey, the locator is bound to notice the entry on which the survey is founded, viz. Galloway v. Neale, 1 Bibb's Reports, 139; Ward and Kenton v. Lee, 1 Bibb, 27; Johnson v. Marshall, 4 Bibb, 134; Findlay v. Granger, 2 Marshall's Reports, 181; Moore v. Dodd, 1 Marshall, 144; Thubalds v. Fowler, 3 Marshall, 579; Rerpass v. Arnold, Hardin, 116.

The circuit court has reasoned so well on the notoriety and

indentity of the entry, that it would seem a waste of time to repeat in substance, what has been said by them. Indeed, it is believed that before a court acquainted with the rules of decision in Kentucky, a controversy on the validity of Voss's entry would never have been raised, but for the opinion of the court of appeals in the case of Merriwether v. Davige, 2 Littel's Reports, 38, where the court decided that the objects called for in Patton's entry had not been established, and that consequently, Merriwether, who depended on Roberts, who depended on Patton, must fail against the elder patent of Davige. But a recurrence to the evidence of that case and this, will show an entirely different state of proof. Besides, Voss and Allen call for the survey as actually made; whereas, Merriwether calls merely for the entry, without the aid of the survey.

Taking it therefore as granted, that Voss's entry is fully established, we shall proceed to examine such parts of the controversy as we think require the revision of this court.

The first point we will notice in which we think the court erred, is that in which they decide the complainants have no equity beyond the quantity of eight thousand five hundred acres, because the survey, on its face, purports to contain but that quantity. This error has arisen, it is presumed, from an idea that the survey purported to survey a *part*, and not the whole entry, and that the balance of the warrant was, or might have been re-surveyed. Upon no other view of the case, can the decree be sustained. A reference to the survey, however, will show that the surveyor purports to survey the entire entry, and the entry purports to locate the entire warrants. Both survey and entry recite the Nos. 8990 and 8991, and that in the *same words*, and neither survey nor entry expresses, to appropriate a part of these warrants. The warrants do, in fact, contain ten thousand acres, and the entry purports to embrace ten thousand acres. The business of the surveyor was to survey the location according to its locative calls, and he proceeded to do so, but according to his calculation, the entry only embraced eight thousand five hundred acres of land, and he reports a survey on the entry and warrants as only containing eight thousand five hundred acres, when in fact it embraces more than ten thousand, for which the commonwealth made

her grant to Voss. By law all the lands within the bounds of the grant as marked, passed; and where patent calls differ from the boundary as to quantity, in every case of the kind from the foundation of the state, the Kentucky courts have held the grant to be good for the whole quantity embraced by the bounds, and not confined to the quantity expressed in the grant. In the old case of Beckley v. Ransdale, Printed Decisions, 107, the court of appeals of Kentucky assigns unanswerable reasons why the marked boundary, and not the patent calls, where they differ as to course or distance, shall prevail, to wit: the unevenness of grounds, and the mistakes of surveyors. This case, more than any other now remembered, illustrates and verifies what the court there assigns, as good reasons for departing from the face of the patent and adhering to actual boundary. Voss had ten thousand acres of land warrants—he made an entry on the whole warrants for ten thousand acres, and employed the surveyor to run out his entry The surveyor does so, and reports that owing to the course of the river, there is but eight thousand five hundred acres of land in the entry. Such was the result of his mensuration and his calculations. Voss takes his patent, but when he has a fair calculation made, his entry holds out full ten thousand acres, as likewise does his patent. Now all that is required to succeed in a land contest *in Kentucky*, is, that the complainant show a valid *entry*, *survey* and *patent*, unless the defendant show an elder special entry. Voss had a valid entry (say the court) for all the land in contest. Voss's survey and patent cover his entry, and all the land in contest. Well, why does he not succeed? Simply because an ignorant surveyor, in making his estimate of the number of acres within the entry, committed the gross error of estimating his survey, containing full ten thousand acres, to contain only eight thousand five hundred. This mistake was not through the fault of Voss or his alienees, nor should it prejudice them. Certainly the defendants cannot complain—their entries are good for nothing, and they surveyed on the face of Voss's special entry. They were bound to know they were in Voss's special entry, and equally bound to notice that Voss had, by actually meeting and bounding his survey, surveyed them in, by virtue of his entry. Here, we

ask, had not Voss a special entry and survey for the land in contest, and has not his alienee, Short, obtained in virtue thereof a patent? The answer must be yes! When this is granted, we hold that Voss has manifested the best equitable right to the whole ten thousand acres in controversy.

The next point to be considered in which we think the court erred, is the manner in which they have directed Allen's land to be laid down. It is a settled principle of decision in the courts of Kentucky, that wherever the courts can, without doing violence to the other calls of the entry, they will decree it to be surveyed in a rectangular form. Hite v. Harrison, Hughes's Reports, 15; Smith v. Grimes, Hughes's Reports, 18; Kennedy v. Payne, Hardin's Reports, 10; Moore v. Harris, Printed Decisions, 27; Black v. Bolts, 1 Bibb, 96; Pribble v. Vanhooser, 2 Bibb, 120, and numerous others. Allen calls to begin at Patton's, north west corner of his survey, and run with his line south two hundred and fifty poles, thence down the creek westwardly for quantity, &c. The definite article has reference to no creek specified either in Patton's or Allen's entry, and can be supposed to refer to *Bare-Bone* creek, only because that is found to be crossed by his line of two hundred and fifty poles along Patton's north and south line. The question then arises, is the call to run down the creek on both sides a call of general description or special location? Certainly not the latter. Suppose no other call to have been made than down the creek, where would you attach the entry? Why, to no creek or place whatsoever. And shall a call of general description, which cannot fix an entry without a special call, govern or control such special call? We say not, and we believe it to be the invariable rule of decision in Kentucky. See Swearingen v. Smith, 1 Bibb, 92; Black v. Bolts, 1 Bibb, 96; Burk, &c. v. Toodd, &c., 1 Bibb, 67; Shannon v. Buford, 2 Bibb, 117, and numberless others. Where the entry calls to begin at the *mouth*, *head* or other *point* on a stream, and to embrace such stream, there we admit such stream becomes locative, and no longer merely descriptive; but here Allen makes his entry and has but two locative calls: first Patton's line, and to run south two hundred and fifty poles. Had he stopped here, his entry, according to the case of Lancaster v. Pope, and the case of

Merriwether v. Phillips, 5 Littel's Reports, 182, would have been void for uncertainty, because he did not state whether he would angle up or down, east or west. He had fixed his base, and then says, he will run down the creek on both sides. Had he stopped, he might have been supposed to have made the call for the creek locative, but he could but perceive the probability of running north, south, east or west on such a stream, and to explain what he meant, and to govern his call for the creek; he added "westwardly for quantity."

The courts of Kentucky uniformly make calls for westwardly or southwardly, mean *west* or *south*. Bradford v. M'Clelland, Hughes, 104; Craig v. Hawkins, 1 Bibb, 53; Clark and Oscar v. Stribbing, 1 Bibb, 122. In this entry *west* gives right angles to the base line, and every call in the entry locative or descriptive, will be complied with. The land will lie between parallel lines, and embrace a rectangular form, and lie on both sides of the creek. We think, therefore, the court erred in not adopting the line I. B. as the base of Voss's entry, instead of the line I. A. Indeed, the experimental survey returned in the cause, shows that to make Bare-Bone a locative call, would be to give Allen the most ludicrous figure imaginable—that from the course of the stream, it is impossible to hypothecate lines parallel to each other, which will embrace the stream.

The court itself has abandoned its own decree in giving directions how to lay down Allen's survey. As they have at last fixed it, the south boundary cuts the creek, and the creek runs from thence nearly south. Now it is impossible to conceive how the court can arbitrarily depart from both the creek and west point, and fix on the point 60 W., except that they found the call to embrace the creek in equal lines impossible, and that the entry, pursuing the idea that the creek was to be in the centre, would exhibit an absurd figure with serpentine lines, to correspond to he serpentine windings of the stream. In attempting to do which, part of the survey would be west, and a part run south. Supposing it then to be a locative call to run on both sides of the creek from the base of two hundred and fifty-nine poles, what did the uniform current of decisions in Kentucky declare should be done? Why, that the court should reject the absurd calls, and calls impossible to be

complied with, and survey the entry as if they were not in it. See Bosworth v. Maxwell, Hardin's Reports, 209; Pauling v. Merriwether's heirs, Hughes. 14: Consilla v. Briscoe, Hughes, 45; Lenton v. M'Connell, Hughes, 162; Prebble v. Vanhooser, 2 Bibb, 121, &c. &c. And that would be to run Allen two hundred and fifty poles south, and at right angles west for quantity. Whether therefore we consider the call for "down the creek" as descriptive or locative, the result will be the same, and a plain practicable mode of surveying both Allen and Voss, presents itself to the mind of every one.

These errors examined, another presents itself, which we hope will appear equally obvious. It is so much of the decree as gives a *moiety*, instead of the *whole* land covered by the complainants' survey and patent. The court have proceeded on the idea that, to enable a party to maintain a bill in equity against an adverse title, the complainant should have a complete legal title. This has been repeatedly overruled by the appellate court of Kentucky. All they have required is, that the complainant shall have the entire title either before suit or before final decree. In numerous cases the persons holding the equity have been allowed to sue on an executory contract, their vendors and the adverse claimant. All the courts have required is, that the complainant shall show a clear equity to the thing, by grant or bringing his trustee into court. In the old cases of Thompson and Blair, where the complainant showed no patent, the court of appeals allowed the inferior court to give time to complainant to obtain a grant, and decided that if he did, to decree him the land, and if he did not obtain the patent, to dismiss his bill. As to a legal title there can be but one, and defendants had that one. The commonwealth had granted the land to the grantors of the defendants, and the grant to Short conveyed no title whatever. It was, according to the opinion of this court, in the case of Elmendorf and others v. Taylor and others, 10 Wheat. 152, void, the commonwealth having previously granted all the title held to the first patentee. All the reason ever assigned in Kentucky for the production of the patent, was that the complainant may thereby show he complied with the law, paid the fees &c., that his equity was permanently fixed to the thing, not with-

drawn, or liable to be withdrawn, as is the case after survey and patent. The whole reasoning resolves itself into this, that the equitable claimant is he who ought to have the title held by another. Now, Omealy claims to be such: but the defendants allege the deed of Short to Breckenridge—not that it conveyed a legal title, for that was in themselves; but as evidence, the equitable title as to a moiety was not in complainants. To this complainants reply, Breckenridge's title is an inequitable one. He bought from us, but has failed to pay the consideration. Now, in such a case, what more could the defendants or the court require of complainants, than to show they held the entire equity as they alleged. This they could do in various ways. 1. By making Breckenridge's heirs parties. 2. By a separate suit (as they have done) get back the deed of the heirs of Breckenridge before trial.

Equity considers that as done, which ought to have been done. The record clearly shows that John Breckenridge had no equitable claim to the land in contest, and that he or his heirs should have released it. Considering that as done which ought to have been done, how stands the case? The complainants, who allege themselves to be the entire owners of the equity growing out of Voss's entry, sue the defendants for the whole, and not a moiety, and on the trial not only show that they were purchasers of the equity from Short, and that Breckenridge was their mere agent to be rewarded with part of the land, but also produce the release of Breckenridge's heirs. Suppose Breckenridge's heirs had been made parties, and no release by them executed until the final decree, surely no doubt could exist as to the complainants' claim to a decree against defendants. Can equity make a distinction between such a case, and the one before the court?

Should the court, however, consider the complainants as only acquiring an equity on the 25th day of May 1826, when the deed of release was executed to them by Breckenridge's heirs, then according to no principle can the complainants be barred by time. Those claiming under Hite and Daniel did not settle until 1808; Howard did not settle until 1804, and when Howard entered, the complainants resided out of the state. Of course, according to a well settled principle of law,

the statute did not begin to run until they all came into this state. See 2 Digest of the Statutes of Kentucky, 861; and Graves v. Graves, executors, 2 Bibb's Reports, 207. John Breckenridge is admitted to have died in 1806 or 1807, leaving his children all minors except one, and that a *feme covert*, and one of them, William Breckenridge, only three years old. As the seven years act could not run against their equity until all became of age, and William did not until 1824; this time, by the direction of this act, must be deducted. See 2 Digest of the Statutes of Kentucky, 806; May's Heirs v. Bennet, 4 Littel's Reports, 311; Kennedy's Heirs v. Duncan, Hardin's Reports, 365. This act went into operation in 1816, and has no relation to the possession before John Breckenridge's death.

As the complainants acquired the deed in 1826, and filed their amended bill in 1829, alleging that fact, the seven years act must be thrown out of the question. Our suit for the whole land was depending, and the entire title set up in the year 1815. Now suppose the papers that relate to the controversy with Breckenridge, not to manifest the complainants' equity prior to the decree in their favour. That decree was made in 1822, within eighteen years after Howard's entry on the land, and within fourteen years after the entry of Trout under Daniel and Hite. As we alleged an entire equity, surely all the court can require of us is to show, before the twenty years had run, the evidence of that equity. The papers filed as exhibits were read without objection, as was the deposition of Moreton. The papers and letters show the original nature of our claim, and Moreton's deposition shows that it was taken in the suit of complainants against Breckenridge's heirs in the year 1816, and the decree is entered in 1822, settling the equity in the property to be in the complainants, and a release is produced before the hearing of the cause.

It is therefore contended that the honourable the circuit court erred. 1. In limiting the recovery to eight thousand five hundred acres of land. 2. In the manner in which they directed Allen's entry to be surveyed. 3. In deciding that as to a moiety of complainants' equity, they were barred by the statute of limitation of twenty years.

Mr Loughborough, for the appellees.

This is a case of conflicting land claims. The bill of Holmes and others, filed November 23, 1815, sets up title as follows, viz.

Edward Voss's entry for ten thousand acres, October 11, 1783.

Survey of eight thousand five hundred acres of said entry, February 16, 1789.

Assignment of certificate of survey to P. Short, and patent to him of March 16, 1790.

Conveyance by Short to Holmes, December 10, 1796, alleged to be for the benefit of the other complainants.

The bill alleges that the defendants are in possession of the land under illegal entries, surveys and patents, and prays that they may be compelled to surrender the land, and release their claims.

The defendants, Daniel and Jeremiah Trout, Jacob Overpeck and William Buchannan, severally answer and show title under a grant older than complainants' survey and patent, issued to Daniel and Hite for six hundred acres.

The defendants, the Morelands, jointly answering, show title under a grant to Christopher Clarke for four hundred and fifty acres, also older than the survey and patent upon which complainants rely.

The defendants also say, that although the boundaries of complainants' survey of eight thousand five hundred acres as made, do include their possessions, yet that it was illegally made to include too much land; and that a survey made to begin at the beginning corner of Voss's entry, will give complainants the quantity of eight thousand five hundred acres named in their patent, without interfering with the defendants.

In May 1829 the complainants filed an amended bill, setting forth, that having engaged John Breckenridge to investigate their claims in Kentucky for one moiety thereof, they gave him the deed of December 10, 1796, from Short, which was cancelled, and a new deed taken from Short, dated September 21, 1804, to complainants and Breckenridge in equal moieties: that the title to the moiety of the land in controversy, vested in Breckenridge by the last aforesaid deed, has been reconveye-

to the complainants under decree of court of June 16, 1824, the deed of the commissioner bearing date May 23, 1826.

To this amendment the defendants respond, that they have been in the adverse possession of the land twenty years previous to its being filed, and rely upon the bar by lapse of time.

The court decreed the entry under which complainants claimed a valid one—that they were entitled to eight thousand five hundred acres, the quantity named in their survey and patent, and that the defence, resting upon twenty years adverse possession by the defendants, was a bar to so much of the right asserted by the complainants, as was derived to them from Breckenridge's heirs.

A survey having been made under order of court, it appeared therefrom that complainants' eight thousand five hundred acres being surveyed from the beginning of Voss's entry, running with the calls thereof, the defendants D. and J. Trout, Overpeck and Buchannan, were not included therein, but the Morelands were. The bill was therefore dismissed as to the first named defendants, and the Morelands decreed to surrender one half of their land.

The complainants, not satisfied, have appealed.

For the appellees, it will, in the first place, be contended, that the entry of Voss is invalid.

This entry calls to begin at the north west corner of Patton's survey of eight thousand four hundred acres, without any general description, leading a subsequent locator into the neighbourhood of the land intended to be appropriated; and without showing where Patton's survey is to be found. It is, in this respect, defective. See Matson v. Hord, 1 Wheat. 130; Johnson v. Pannel's Heirs, 2 Wheat. 206; M'Dowell v. Peyton et al., 10 Wheat. 454; 1 Bibb, 22, 122; 2 Bibb, 107, 142.

Patton's survey was made 20th September 1783, on an entry dated 26th December 1782. As the entry of Voss depends upon Patton's entry, in the absence of any proof of the identity and notoriety of the lines and corners of Patton's survey, it is incumbent upon the complainants to establish the latter entry.

In Merriwether v. Davidge, 2 Littel, 38, the court of appeals of Kentucky held this entry of Patton invalid.

The descriptive calls of this entry are not shown to have

been sufficient, at the time it was made, to lead a subsequent locator into the neighbourhood of the land.

The proof is not sufficient to show, that the marked tree claimed as the beginning of Patton's entry, was in fact marked before or at the time of making the entry. The legal right of the defendants should not be made to yield to a doubtful equity. The court will require the prior equity to be unquestionably established. Cleland's Heirs v. Gray, 1 Bibb, 35.

The only witness whose testimony approaches to proof on this point is Merriwether, who was interested in the establishment of this entry in the state court. A year *or two* after the entry was made, he saw a marked tree that might answer for the beginning of Patton's entry, and which tree, *he supposed*, was the same that Patton said he had marked as his beginning—for Patton was not in company with him. From the appearance of the tree *his opinion* was, that it was marked as early as the date of the entry.

Sanders says, that in May 1783, Patton showed him a mulberry tree marked plainly with the letters J. P. and told him it was the beginning corner of his entry. Other persons were in company with Merriwether, whose testimony is not taken.

From the present existence of artificial objects, their existence at the date of an entry cannot be presumed. 3 Bibb, 126; 4 Bibb, 158. See a case of an entry held invalid upon proof like this, in Humphreys v. Lewis, 4 Monroe, 337; also Miller's Heirs v. Haw's Heirs, Hardin, 30.

Patton's entry does not state what species of tree was marked, nor on what side of the creek it is, nor how far from it. The beginning claimed is forty poles short of two miles from the mouth of the creek. The locative calls are too indefinite, when we consider the nature of the object assumed as the beginning—a tree in the forest. Full proof of the identity of this tree, and that it could, at the date of the entry, be identified by others, is essential. Such proof is not here.

The call "*about* two miles up the branch," though it might perhaps be sufficient in a case where the object at the termination of the distance is unusual or conspicuous—such as will arrest the attention of a woodsman—will not be deemed good in this case. Throw out the word "about" and an extensive

circuit of forest would have to be minutely searched to find a marked tree forty poles from the termination of a two mile line.

This court will look into the case of Merriwether v. Davidge, 2 Littel, 38.

If the entry of Patton shall be established, we next come to that of Voss, immediately in controversy.

This calls for the *north west* corner of Patton's survey of eight thousand four hundred acres, which survey was made September 20, 1783, only twenty days before the entry of Voss.

Patton's survey was not of record, and therefore no notice to subsequent locators. Key v. Matson, Hardin, 70; Elmendorff v. Taylor, 10 Wheat. 152; Carson v. Hanway, 3 Bibb, 160.

Making a survey is not an act of notoriety in the country, and locators who adopt surveys as the foundations of their claims, must prove that they could have been found with reasonable inquiry. 1 Bibb, 7, 35, 39, 63, 139; 2 Bibb, 113, 135.

There is no proof in this cause, that at the time of Voss's entry the lines and corners of Patton's survey were marked at all, much less that they were subjects of general reputation and notoriety. They should have been notorious. 1 Bibb, 39 and 137; and cases there cited; 1 Monroe, 63; Howard v. Todd, 1 Marshall, 275; Moore v. Dodd, 1 Marshall, 144; Hardin, 89, 112, 177.

No witness is produced who was present at the making of the survey, or who, at any time previous to the entry of Voss, had seen the north west corner of Patton, or had traced any of his lines.

As the survey existed only in the field notes of the surveyor, what was there to teach a subsequent locator, that the corner called for by Voss, was five miles north of Patton's beginning, or any where in that vicinity? It would be rash to presume that the survey conformed exactly to the entry. (See Ward and Kenton v. Lee, 1 Bibb, 18.) Such was not the fact here. The connected plat shows that the north west corner of Patton, as supposed and erroneously assumed upon the evidence by the court below to have been marked at the time of the

survey, is in truth near half a mile more than five miles from his beginning. Surveys very often vary from the entries.

When an unrecorded survey is notorious at the time, *both as to its calls and its position*, it may answer the calls of an entry. Seay's Heirs v. Walton, 5 Monroe, 368.

An entry calling for the lines of a survey, neither recorded nor notorious, is invalid, although the *claim* on which the survey was made, was notorious. Findlay v. Granger, 2 Mar. 179.

An entry calling for a survey cannot be sustained, unless the boundaries of the survey are shown; showing the entry on which the survey was made is not enough. Clay v. M'Kinney, 3 Mar. 570; see also Bulor's Heirs v. M'Cawley, 3 Mar. 573; Theobald v. Fowler, 3 Mar. 577; 3 Marshall, 190.

A survey only a few days old and not notorious, can only uphold an appendant entry by being conformable to a certain and precise entry. Johnson v. Marshall, 4 Bibb, 133. Patton's survey is not conformable to his entry.

But if the entry of Voss shall be deemed valid, how do the complainants show their title under the patent issued to Short thereon?

The deed of December 10, 1796, set forth in the original bill, is a nullity. When offered in evidence, the signature of the grantor was erased. It was never recorded, nor was there any proof offered competent to show its execution by Short. The deposition of William Moreton, in the record, was taken between other parties, to be used in suits to which these defendants were strangers. It cannot be evidence in this case. So also of the letters copied into the record.

The original bill, and the proceedings under it, show no title in the complainants, except in virtue of the deed of 1804—if it shall be considered that that deed is relied on in the original bill. It does not appear to have been. The complainants say that Short conveyed his land to John Holmes—not to the complainants and Breckenridge jointly. It is true the deed of 1804 is filed with the original bill, but the title alleged is not derived through that deed.

The whole tenor of the original bill is, that the complainants

are entitled to *all* the lands of Short. They do not admit a participation of the title with them by any one. Why was this?

If they relied upon the last deed, then it would appear that proper parties were not before the court, and the title could not be asserted until they were. Russel v. Clark's executors, 2 Cond. Rep. 417; Mallow et al. v. Hinde, 12 Wheat. 193; West v. Randall, 2 Mason, 181; Fallowes v. Williamson, 11 Vesey, 306; 16 Vesey, 325; 6 Johns. Ch. Cas. 450; 3 Bro. Ch. Rep. 229; 2 Vesey, Sen. 312; 4 Johns. Ch. Rep. 199.

Further, the heirs of Breckenridge are citizens of Kentucky, and the court below could have no jurisdiction of the suit, if they were joined with the complainants. Strawbridge v. Curtis, 3 Cranch, 267; Ward v. Arredondo et al., 1 Paine, 410; Corporation of New Orleans v. Winter, 1 Wheat. 94.

In Elmendorf v. Taylor, 10 Wheat. 152, when this objection was made, the court overruled it, because the persons not joined, and alleged to be tenants in common with complainants, were entitled to one-fourth part, not of the whole land sued for, but of a specifically described portion of it—which may, or may not, interfere with the land claimed by defendants. Here the interest of the heirs of Breckenridge, under the deed of 1804, is a moiety, undivided, of *all* the lands named in the deed.

In their amended bill, the complainants abandon the claim of title under Short's first deed, and say that it was cancelled, but that Short executed a new deed to them and Breckenridge—and that the interest of the heirs of Breckenridge has been acquired by them under decree.

This bill, it is insisted, was introductory of a new and distinct title into the suit, or rather it was the first assertion of any title. Previous to its being filed, there was no legal evidence of title in the complainants. They change their ground altogether in it.

The defendants might have resisted the filing of the amended bill. In 1 Gallison, 123, it is held that an amendment will not be allowed to introduce a new cause of suit, against which the statute of limitations has run. See also Cox v. Lacey, 3 Littel, 334; May's Heirs v. Hill, 5 Littel, 308; Elliott v. Bo-

hannon, 5 Monroe, 123; Currie v. Tibb's Heirs, 5 Monroe, 440; Dudley v. Grayson, 5 Monroe, 260. These are cases at law, but the principle is the same in chancery.

Defendants, however, agreed that the amendment might be filed upon condition that if it should be found introductive of a new title, they should have a right to insist on the defence by lapse of time.

It is contended that the complainants do not, by the amended bill and the exhibits, show themselves invested with the title to the land in controversy.

Short, in 1796, had conveyed his land to Holmes. The deed, although not recorded, passed the title between the parties, and though not proved so as to be valid against the defendants, yet they may avail themselves of the admissions of the complainants, that it was executed and accepted by the grantee. Did the erasure of Short's signature to this deed, revest the title in him, so as to enable him to make the deed of 1804? The title being in Holmes, under the first deed, Short could only obtain it by a reconveyance. But none is exhibited. Neither is there any competent proof in this cause of any facts or circumstances equivalent in equity to a reconveyance to Short. Nor is there any thing properly to be regarded by this court, which can show Holmes to have been the trustee for the other complainants.

It is objected to the deed of the commissioner under the decree against the heirs of Breckenridge:

1. That R. I. Breckenridge who made it was not authorized so to do. He was not appointed commissioner by the court to convey: as attorney or guardian *ad litem*, for his co-heirs, he could not make the deed.

2. The deed was defective in form and substance. The grantor is R. I. Breckenridge, not as commissioner.

3. It does not appear to have been approved or confirmed by the court.

The defendants rely upon adverse possession, and the important questions are, shall they have up to the period of filing the amended bill for the computation of time for a bar: and whether, if they shall, the bar shall be of the moiety or totality of the right asserted in the amended bill. The court below

has responded to the first question in the affirmative, but has limited the bar to the right derived from Breckenridge's heirs. As the complainants now seek more and against other defendants, it is contended for the defendants that the whole right should be barred. Will the institution of a suit for land by a person having no right, stop the running of the statute, which equity adopts, until he can get a title? Whether these complainants, having no right to the land held by the defendants under the grants of Clarke and Hite which they can assert in the circuit court, may yet file a bill, and years afterwards acquire a title to be engrafted in the suit, and have relation back to its origin?

That the amended bill shall not relate to the beginning of the suit. See Taylor v. Floyd, 3 Mer. 18; Miller v. M'Intyre, 6 Peters, 61; Sicard v. Davis, 6 Peters, 124.

Breckenridge died in 1806 or 1807, after adverse possession taken of the land in Clarke's grant held by the Morelands. The descent upon the infant heirs did not stop the running of the statute. Walden v. Gratz, 1 Wheat. 292, 3 Cond. Rep. 570.

That this possession was held at different times under various rights, is no objection; they were all adverse. Shannon v. Kinney, 1 Mar. 4; Hord v. Walton, 2 Mar. 621; Alexander v. Pendleton, 8 Cranch, 462.

As to extent of possession by junior patentee within interference. See Fox v. Hinton, 4 Bibb; Sicard v. Davis, 6 Peters, 139.

Complainants cannot avail themselves of any privilege of the infant heirs of Breckenridge, supposing that these had any, opposed to the running of the statute. An infant cannot transfer his protection in virtue of the saving clause of the act of limitations. It is personal. May's Heirs v. Slaughter, 3 Mar. 505.

In a joint estate to several persons, if the right of entry is tolled as to some, all are barred. Dickey v. Armstrong, 1 Mar. 39; Smith v. Carney, 1 Littel, 296; Floyd's Heirs v. Johnson, 2 Littel, 109.

But by the act of Kentucky, January 22, 1814, the time allowed infants after the removal of their disabilities to make

entry or bring suit had elapsed, as to all the heirs of Breckenridge before the deed to the complainants conveying their right, and the filing of the amended bill. That act gives three years after arriving of age. See Clay's Heirs v. Miller, 3 Mar. 147. That one of the heirs became a *feme covert*, will not avail to save the right. Disabilities cannot be added to each other, besides she was for a period discovert. 1 Mar. 375.

Allen's entry is laid down correctly by the court below. It is not such an entry as can properly be surveyed in a rectangle. The call "down the creek on both sides" cannot be rejected, and as the general course of the creek is not west, the side lines of the entry cannot be at right angles to the base.

"Westwardly" in an entry is not synonymous with *west*. Craig v. Hawkin's Heirs, 1 Bibb, 53; Hughes, 18, 104.

A base line being given by the entry, the word "westwardly" serves only to show on which side of that base the entry shall lie. 1 Bibb, 53.

"Westwardly" is an indefinite call. Hendricks v. Bell, 1 Bibb, 138, 122; 2 Bibb, 120.

"Down the creek on both sides" is a definite call.

Definite calls cannot be controlled by indefinite ones. Calk v. Stribling, 1 Bibb, 122. Certain and definite calls control indefinite calls, rendered certain by rules of construction. 2 Bibb, 622, 627; 4 Bibb, 161; 1 Mar. 608.

The words *westwardly*, *northwardly*, &c. have never been construed as west, north, &c. except where there was no other call in the entry to give it figure or certainty. 1 Bibb, 53. Here it is not so.

Kincaid v. Taylor, 2 Bibb, 122, is authority to show that this entry is correctly laid down, the word "westwardly" being flexible. Allen v. Blanton, 2 Bibb, 523; Carland v. Rowland, 3 Bibb, 127.

An entry should be viewed in all its parts as an entire instrument, thereby to give to each expression its proper bearing and effect. Baker v. Hardin, 3 Bibb, 414.

There is no repugnance in the calls of Allen's entry: all of them have been regarded in the survey directed by the court below.

Complainants' survey and patent specify the quantity of

land at eight thousand five hundred acres; and the decree of the court below has given them that quantity. Yet they insist that they are entitled to ten thousand acres.

No case has been found in which a complainant in equity against an older grant has been allowed more land than the quantity called for in his patent, actually surveyed under order of court. For every acre of land held by a defendant in virtue of a prior legal title, the complainant must show before he can obtain it, first, a prior valid equity; secondly, a junior legal title.

An entry not surveyed, nor carried into grant, cannot be made the foundation of a decree against a patent. Steel v. M'Dowell, 2 Bibb, 123; Blain v. Thompson, 3 Bibb, 148.

If there is any mistake in this case, it is the common error of making a survey to embrace a large surplus, so often committed in Kentucky. And an argument built upon the fact that the bounds of the survey contain more than eight thousand five hundred acres, would show that the surveyor meant to write in the certificate of survey not ten thousand acres, but sixteen thousand acres, which is about the quantity actually included in the survey.

By the survey and patent, Short obtained the legal title only to eight thousand five hundred acres of Voss's entry. The remaining fifteen hundred acres might legally have been withdrawn, and were for aught that appears.

It is to be presumed that the survey was made and returned to the land office by the authority of the owner, who might have had the mistake, if any had existed, corrected, and caused a re-survey to be made, but who was satisfied to take a grant for eight thousand five hundred acres only, which must now limit the extent of the claim. Act of 1779, 1 Litt. Laws, 411; Galloway's heirs v. Webb, 1 Mar. 129; Withers v. Tyler, 2 Mar. 174; Loftus v. Mitchell, 3 Mar. 598.

The case of Taylor v. Brown, 2 Cond. Rep. 235, was a contest between two military surveys prior to 1779. It is not analogous to the present case. There the complainants had the elder survey, which was considered as being at once the inception of title, and final appropriation of the land in equity. Surplus was decreed to it. That was the case of a survey

specifically marked and bounded in the country at the time the junior survey was made. This is the case of an entry indefinite as to its extent, and not surveyed until after the survey made for defendants.

The case of Beckley v. Bryan, cited in Taylor v. Brown, shows that surplus in the bounds of survey, shall be rendered to the holder of an entry made prior to the survey. In Johnson v. Buffington, as cited, it appeared that both the entry and survey of the elder patentee were subsequent to the survey of the complainant holding the junior patent.

Mr Justice M'Lean delivered the opinion of the Court.

This appeal is prosecuted by the complainants, to reverse a decree of the circuit court of Kentucky.

The original bill was filed by John Holmes, Michael Omealy, Richard Caton, Hugh Thompson and William Slater, who set up a title under the following entry. "Edward Voss enters ten thousand acres by virtue of two treasury warrants, Nos. 8991 and 8990, beginning at the north west corner of Patton's eight thousand four hundred acres survey; thence, with Allen's line, westwardly to the river, and along Roberts's line to the east for quantity;" "also, five thousand acres by virtue of treasury warrant, No. 8989, beginning at the south west corner of Patton's eight thousand four hundred acres survey, then westwardly with Patton, Pope and Thomas's survey; thence up the river, and on Patton's line on the east, for quantity."

The complainants represent that surveys having been executed on these entries, they were assigned to Peyton Short, who obtained the patents bearing date the 12th and 16th days of March 1790. That Short afterwards conveyed both tracts to the complainant John Holmes, who, by virtue of certain contracts, holds the land in trust for the other complainants; all the complainants having a joint interest in it. The entries of Voss are alleged to be valid, and also the surveys and patents.

The defendants are represented to be in possession of a part of these tracts of land, under grants older than the complainants', but which were founded on entries made subsequent to the complainants'; and they pray that the defendants may be decreed to convey their respective rights to the complainants.

In May term 1829, the complainants filed an amended bill, in which they state that the land in contest was purchased for the use and benefit of Holmes, Slater, Caton and Omealy. That by subsequent transactions, Omealy became the trustee of Slater and Caton; and that an agreement was entered into between the complainants and a certain John Breckenridge, by which he undertook to render certain services, for which he was to have one moiety of the land: and the original deed to Holmes, never having been recorded, was, by the complainants, handed to Breckenridge, with other papers which related to the business, accompanied with directions to Short to make another deed; and full powers, as they are advised, were given by them to Breckenridge to take a deed from Short, vesting the title to one half of the lands in himself, and the other in the complainants. That Breckenridge having obtained possession of the deed made to Holmes, being vested with the power, did agree with Short to cancel that deed, and it was accordingly cancelled. And the complainants represent that Omealy, trustee for John Holmes and William Slater, and Hugh Thompson, trustee for Richard Caton, did on the 21st day of September 1804, receive and take a deed to Breckenridge and themselves, as above stated, and did deliver over the deed of Holmes to Short, who cancelled it by erasing his name therefrom.

It is further stated in the amended bill, that Breckenridge died before the services which constituted the consideration on which a moiety of the land was conveyed to him, were fully rendered; and on a bill being filed by the complainants against Breckenridge's heirs, they were decreed to convey to the complainants a certain part of their interest in the land. This decree was entered at November term 1822.

In answer to the amended bill, the defendants, Jeremiah Trout, Daniel Trout, William Buchannan, Jacob Overpeck, John Moreland, Walter A. Moreland and William Moreland, allege that they had been in the actual occupancy and peaceable possession of all the land claimed by them for upwards of twenty years before the amended bill was filed.

It was agreed between the parties that John Howard entered on the land in controversy, by virtue of his claim of seven

thousand nine hundred and forty-five and a half acres, by his tenants, within the claim of C. Clarke; that the entry was within the boundary of said Clarke, and that Howard's claim wholly covered the claim of Clarke; that this entry into the possession was made in the year 1804, and continued, without interruption, adverse to the claim of Voss and Short, and those who claim under them, until the year 1813, when William Moreland, a purchaser from Clarke, brought an action of ejectment against Howard and evicted him. That possession was taken by Moreland, which has been held by him and his devisees ever since. It was admitted that Daniel Trout, in the year 1808, purchased the claim of Daniel and Hite's six hundred acres within complainants' claim; and that Daniel and Jeremiah Trout entered into the possession under such purchase, and ever since have held, by themselves and their grantees, Overpeck and Buchannan, adversely to the complainants.

As the entry of Voss, under which the complainants claim, was made before the entries under which the defendants claim, the complainants have a prior equity if their entry can be sustained. The validity of this entry, therefore, is the first point for examination. It calls to begin at the north west corner of Patton's eight thousand four hundred acres survey, and for Allen and Roberts's line. Patton's entry was made on the 26th December 1782, for eight thousand four hundred acres, upon a treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen Mile creek, beginning at a tree marked J. P., to run north five miles, then to extend off at right angles for quantity: this entry was surveyed on the 20th September 1783, and calls to begin at a mulberry, elm and sugar tree, marked J. P., standing on the bank of the first large creek running into the Ohio above the Eighteen Mile creek, two miles up the said creek. On the 11th October 1783, John Allen entered one thousand acres, part of a treasury warrant, No. 14,198, beginning at the north west corner of Patton's eight thousand four hundred acres survey, and running with his line south two hundred and fifty poles, thence down the creek on both sides, westwardly for quantity, to be laid off in one or more surveys

Roberts's entry bears date on the 26th December 1782; the same day Patton's entry was made.

As Voss's entry can only be sustained by sustaining the survey and entry of Patton, it will be proper in the first place to inquire into their validity.

To support the entry of Patton, several witnesses were examined. Merriwether Lewis states that Eighteen Mile creek, one of the descriptive calls in this entry, was known previous to the year 1782, and that Patton's creek is the first one falling into the Ohio above Eighteen Mile creek, except Bell's spring branch, which is not much more than a mile in length; that Patton's creek was so called from the time the above entry was made, and was generally pretty well known by that name as early as October 1783. He does not recollect the year he became acquainted with the tree marked J. P., but he thinks, within a year or two after the entry was made, he was at the tree marked, which stood two miles up Patton's creek, lacking forty poles. The letters J. P. were very large, and marked on a mulberry tree standing near the creek; that Patton informed him of the entry shortly after it was made, and that he had marked the tree, and run one of the lines before he made the entry. From the appearance of the letters on the tree when he first saw it, the witness has no doubt that it was marked at the time represented by Patton. He was enabled to find the marked tree without difficulty, from Patton's description of it; and he thinks that any subsequent locator could not have failed to find it. Having found the beginning corner of Patton's survey, the witness says his north west corner, which is called for in Voss's entry, could be found by tracing the line of the survey to that corner.

Joseph Saunders, another witness, states, that in the year 1780, Eighteen Mile creek was well known, and that Patton's creek is the first branch or creek of any note which falls into the Ohio above Eighteen Mile creek. In May 1783, Patton showed him a mulberry tree marked J. P. standing on the north bank of Patton's creek, about two miles from the mouth of said creek, which he said was the beginning corner of his entry. As the letters were large, and the tree stood on the

bank of the creek, the witness thinks it might have been found by any one in search of it.

Several other witnesses prove that Eighteen Mile creek was well known before Patton's entry, and that Patton's creek is the first considerable stream which falls into the Ohio above Eighteen Mile creek; and that after Patton's entry, the creek was called by his name, but they were not acquainted with his entry and survey until some years after they were made.

It is first objected to this entry, that in the case of Merriwether v. Davidge, 2 Littel, 38, the court of appeals of Kentucky decided it was invalid. Its descriptive as well as locative calls are not sufficient, it is urged, to lead an inquirer to the beginning called for; and that a marked tree is not a good call, though the calls which lead to it designate objects of notoriety, unless it be proved that the tree was marked at the time the entry bears date, or prior to that time. And, as there is no such proof in the present case, the entry must be considered void. These and other arguments are used against the validity of this entry.

As it regards the decisions of the court of appeals referred to, it may be proper to remark, that it was made on a different state of facts from that which is proved in the present case. Merriwether Lewis, who was a party in that cause, could not, of course, be a witness; and on examining his deposition it will be seen that he states several important facts respecting the entry.

The decision of the court of appeals was conclusive upon the rights of the litigant parties in all courts; but the inquiry into the validity of Patton's entry is only collateral to the merits of the present case, and a decision upon it, under such circumstances, can in no respect affect the rights which were settled in the case of Merriwether v. Davidge. This consideration and the variance of the proof in that cause from the evidence in this, leave no doubt that the court should regard the validity of this entry as open for investigation in the present cause.

From the evidence it is clear, that Eighteen Mile creek was publicly known before Patton's entry, and that the first branch

above Eighteen Mile creek, which suits the call, was the one on which the entry was made. A person, therefore, desirous of finding the beginning of this entry, could have no difficulty in designating Patton's creek. He must then search for the marked tree about two miles up this creek.

But it is objected, that the entry does not state how near the creek the marked tree stands, nor on which side of it; and that it falls short of two miles, on a straight line, forty poles. The tree stands near the bank of the creek, as appears from the evidence; and the letters marked being large, could easily be seen. The variation of forty poles from the distance called for, was as little as could reasonably be expected, when the circumstances under which this entry was made are considered; and to look for the marked tree within the range of forty poles both up and down the creek, from the exact distance of two miles, would not require unreasonable labour of a subsequent locator. Nor does it seem to be unreasonable, that he should examine on both sides of the creek.

Several of the witnesses say, from the calls in the entry, Patton's beginning corner could have been found without difficulty. This was all that the law required. But it is said that there is no proof at what time the tree was marked. Lewis said it was within a year or two after the entry purports to have been made; and he has no doubt, from the appearance of the marks, that they were made as early as the date of the entry. Experience enables a person to judge with great accuracy how long marks have been made, from their general appearance. In May 1783, only six months after the entry, Saunders saw the marked tree. From these facts, and other circumstances of the case, the evidence established at least prima facie, that the tree called for was marked when the entry was made. If other trees were shown bearing the same marks at other places on the creek, it might create so great an uncertainty as to invalidate this entry. But no such facts are proved in the case.

After an attentive examination of the evidence in relation to this entry, the conclusion in favour of its validity may be safely drawn. In coming to this result, no established principle of law is controverted, nor any sound process of reasoning.

But it is contended, that if the beginning of Patton's entry be established, it does not follow that the entry of Voss is good; as it calls for the north west corner of Patton's survey, which is not the beginning corner, and that a survey which has not been recorded cannot support an entry.

Voss made his entry about twenty days after Patton's survey was executed, and before it was recorded; but the call for the survey necessarily includes the entry, if the survey has been made in pursuance of the entry. It must be admitted that a survey of itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformably to the entry, and the entry can be sustained, as in the case of Patton, the call for the survey may support an entry. The boundaries for the survey must be shown, as has been done in the present case. Johnson v. Marshall, 4 Bibb, 133; Clay v. M'Kinney, 3 Marshall, 570; also the same book, 573, 577 and 190.

Patton calls to run from his beginning corner north five miles, and in making his survey, he ran near six. This shows, it is contended, that the entry of Patton has not been accurately surveyed, and consequently, Voss's entry must fail.

It has been long a settled principle in Kentucky, that surplus land in a survey does not vitiate it; and such a survey is held to have been made conformably to entry. The inquiry is not, therefore, whether the line of Patton, from the beginning corner to his north west corner, which is called for by Voss, and the other lines of Patton, are the exact distances designated; but whether they were so made as to conform to his entry, within the established rule on the subject. Of this there can exist no doubt.

Any one desirous of finding the beginning corner of Voss, having found the tree marked J. P., would trace the line running north to the corner called for by Voss. This he could have no difficulty in finding, although this line is longer than called for in Patton's entry.

That Patton's survey was made before the entry of Voss, appears from the date of the survey and other facts in the case.

From these considerations, the court think that the complainants have sustained the entry under which they claim.

In the further examination of the case, it will be necessary to inquire, whether the title set up by the complainants under the deed executed by Short in 1796, or the one he executed to the complainants and Breckenridge in 1804, shall be held valid. Both deeds are for the same tract of land; and the complainants in this court earnestly contend, that their title under the deed executed in 1796 vests in them a good legal title. From the circumstances under which this deed was executed, and the subsequent proceedings in regard to it, as set forth in the amended bill, the circuit court held this deed to be null and void. With the view to establish the validity of this deed, the complainants alleged a diminution of the record, and this court, at the present term, awarded a certiorari, directing the record of the suit in chancery by the complainants against Short and the heirs of Breckenridge to be certified, on the ground that it is supposed to have been made a part of the record in the present case. That suit was brought by the complainants in the circuit court, to procure a reconveyance from the heirs of Breckenridge, of one moiety of the land in controversy, which had been conveyed to their ancestor by Short, under the deed of the 21st of September 1804, on the ground that he had died before the professional services, which formed the consideration of the grant, were performed. On the final hearing of this case, the court decreed that the defendants should release a part of the land to the complainants, in pursuance of which deeds were executed.

On the hearing, several depositions and letters were read, tending to show, that the deed from Short to Holmes in 1796, was duly executed. A part of this evidence seems to have been extracted from this record, and used on the final hearing in the circuit court of the cause now under examination. This evidence has been certified up with the record, as forming a part of the case: but it is alleged that, as in the amended bill, the decree and the deeds made in pursuance of it, in the case against the heirs of Breckenridge, were made a part of it; and as in the opinion of the court there is a reference to the proceedings in that case, they form a part of the record in the suit now before the court.

The decree and the deeds in that suit, which were made a

part of the amended bill, were incorporated into the record by the court below, and undoubtedly form a part of it: but it cannot be admitted that the evidence in that case, except so far as it was extracted and used in the circuit court, is admissible in this case. That suit was between different parties, and the points presented for the action of the court were different.

No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here, as the only evidence before the court below. If, in certifying the record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but in such case it must appear from the record that the evidence was used, or offered to the circuit court.

It is to be regretted, that on the hearing in the court below any evidence was omitted which is deemed material in the case, but it is now too late to remedy the omission.

To prove the execution of the deed by Short to Holmes, in 1796, the deposition of William Moreton, one of the subscribing witnesses, was read. He proves his own signature, and also the signatures of James Russell and Francis Jones, who were also subscribing witnesses, and he proves the signature of the grantor, although a stroke of the pen is made over it. The witness further states, that he was written to by Mr Short to endeavour to make sales of lands for him, which he did not do; but on being told "by John Holmes what was the best he could do with the land, he advised him to sell, and told him he thought Short would be satisfied." "That he understood the lands were sold, and the papers, or a part of them, between Short and Holmes in relation to the sales, were sent to him, as he believes, to close the business with Short. On the examination of his letter book, he finds a copy of a letter to Mr John Holmes, under date of January 3d, 1797, on which day he forwarded to him by Mr Hughes, inclosed in said letter, the above deed."

On the 10th January 1803, Holmes wrote to Moreton from Baltimore, and says, "the lands you sold on account of Mr Short, were held by Thompson, Mr Caton and myself. These gentlemen will correspond with you respecting them, to which

you will please to attend. I will thank you to do every thing in your power to get the necessary title papers, &c. for my proportion; Mr Omealy, my trustee, has the direction, who will direct you as it respects me."

Mr Caton wrote to Moreton, it is presumed, at the same time, that the interest he had in the lands jointly, he some time before transferred to William Slater, of Baltimore, who would write to him in conjunction with Mr Thompson and Mr Omealy, Mr Holmes's trustee.

And on the 13th January 1803, Mr Omealy, as trustee for John Holmes, William Slater and H. Thompson, wrote to Moreton, inclosing the above letters, and they say, "the annexed letters from Holmes and Mr Caton inform you of our being the proprietors and legal representatives of the land bought of Short, and heretofore held by Mr Holmes, amounting, we believe, to fourteen thousand five hundred acres. By an agreement with Mr Breckenridge, your senator in congress, he has undertaken to procure us a good title, and to effect a sale of the lands. We therefore request that you will surrender into his hands all the papers and documents you may have relating to them, that the title may be vested in him by Short and yourself; and by this authority, we require yourself, Mr Short, and all others concerned, to consider Mr Breckenridge as our assignee for the lands in question, subject to the agreements entered into by Mr Breckenridge and us."

The papers surrendered to Breckenridge in pursuance of this letter, were, "a copy of a letter from Peyton Short to John Holmes, dated Richmond, 29th September 1794." "An original letter from Peyton Short to Mr William Moreton, dated Woodford, 2d April 1795." Also "a copy of a paper, dated Baltimore, 9th May 1795, addressed to Mr John Holmes, and signed by William Moreton, attorney for Peyton Short, respecting the conveyance of fourteen thousand acres of land;" but these papers were not copied into the record, and there is no proof that they were used as evidence on the hearing in the circuit court.

From this evidence, without reference to the facts stated in the amended bill, it would be difficult to come to a satisfactory

conclusion, as it regards the execution of the deed in 1796. There can be no doubt, from the deposition of Moreton, that it was signed by Short, and it is probable that it was forwarded to Holmes, as stated in Moreton's deposition; but there is no evidence of its having been received by him, or that he treated it as a valid instrument. It would seem, from the letter of Holmes, dated the 10th of January 1803, that he was not at that time in possession of this deed; for he requests Moreton "to do every thing in his power to get the necessary title papers," &c. And the memorandum of the paper delivered to Breckenridge, dated 9th May 1795, which was addressed to Holmes, and signed by Moreton as attorney for Short, and which respected the conveyance of fourteen thousand acres of land, could not have referred to an absolute sale of the land to Holmes, it would seem, as Moreton states in his deposition that he did not sell to him. But even admitting that in this respect the memory of Moreton is incorrect, and that, as attorney of Short, he did sell the land to Holmes, does it not appear probable, from the deposition of Moreton, that the conveyance to Holmes was made with the view of enabling him to dispose of the land for the benefit of Short? And if this were the case, whether Holmes first sold the land to his co-complainants, retaining an interest in it himself, or became interested in it by any other means, it does not appear that he was ever actually in possession of the deed, or claimed title under it. If strong doubts rested upon this part of the case, a reference to the amended bill would dispel them. But the facts there alleged, it is insisted, were stated through the mistake of counsel, and that the rights of the complainants ought not therefore to be prejudiced by them.

On such an allegation the court cannot disregard the case which the complainants have made in their bill. They allege expressly that the deed executed by Short to Holmes, never having been recorded, was delivered up and cancelled by those who had full powers on the subject, and that another deed was executed by Short, upon proper authority, vesting the fee to one moiety of the land in Breckenridge, and the other in the complainants. And by eference to the decree, in the

case against the heirs of Breckenridge, it appears that this deed was treated as a valid instrument, as the heirs were required to convey a part of the land held under it to the complainants.

The principle is admitted, that the mere cancelling of a deed does not re-invest the title in the grantor under the laws of Kentucky; but, under the circumstances of this case, the court are clear, that the deed to Holmes must be considered as a nullity. It has been so treated by the parties themselves, not only, it would seem, by the decree against the heirs of Breckenridge, but by the express allegations of the amended bill. If, therefore, it were proved that this deed had been delivered to Holmes, or was found among his papers after his assignment, the court could not hold it valid in opposition to the acts and allegations of the complainants. The conveyance may have been made with the sole view of enabling Holmes to convey to others who had purchased; and a different arrangement being made, as the deed had not been recorded, and Holmes not having acted under it, it was probably surrendered, with all other papers relating to the land, to Breckenridge, by those who had full power to do so, as stated in the amended bill: on which surrender, Short executed the deed to the complainants and Breckenridge. Whatever may have been the facts in regard to the delivery of the deed to Holmes and its surrender, this court have no difficulty in treating it as a void instrument, under all the circumstances of the case.

In this view of the facts, the complainants must rest their legal title to the land in controversy, on the deed executed in 1804, agreeably to the case made in their amended bill. Whatever equitable claim the complainants may have had to this land, the deed to Breckenridge conveyed one moiety of it to him; and the next point of inquiry is, whether the decree obtained against the heirs of Breckenridge, and the conveyances executed in pursuance of it, as set forth in the amended bill, must be considered as setting up a new right, so as to give to a part of the defendants the benefit of the statute of limitations which they plead.

The conveyance was executed to Breckenridge on the consideration of services to be rendered in establishing the title to

the land. These services were only rendered in part before the decease of Breckenridge, and on that ground the court decreed that his heirs, to whom the land descended, should convey to the plaintiffs a part of the land.

Before the conveyances under this decree, the complainants could not be considered as having any claim to the land conveyed to Breckenridge, more than they would have had if the contract had been to pay money instead of services, and he had failed in paying a part of the amount. In such a case, the complainants might have asked a rescision of the contract, except for so much of the land as had been paid for. Or, they might have asked a specific execution of the contract; or have compelled the payment of the residue of the consideration by an action at law. But, until the complainants had made their election to proceed against the land, and had, through the decree of a court of chancery, obtained a conveyance of it, they possessed no specific right to the land which they could enforce either in law or equity, against persons in possession under an adverse claim. It therefore follows, that the title set up in the amended bill, under the decree against the heirs of Breckenridge, is a new right, and must be considered as having been first asserted by the amended bill; and as this bill was filed in May term 1829, the statute of limitation will constitute a good bar so far as the right under the decree is asserted against the defendants, who have held, adversely, twenty years or upwards.

It is true the complainants are non-residents, but so far as the land obtained by the decree against the heirs of Breckenridge is concerned, the statute had begun to run before the decree; and that proceeding does not arrest it.

The survey of Voss was made for eight thousand five hundred acres on the 16th February 1789, and the patent was issued to Short, as the assignee of Voss, on the 16th March 1790, for eight thousand five hundred acres. In running the lines of the survey, which purports to appropriate only eight thousand five hundred acres of the entry, they were made to include a large surplus of land, beyond the calls of the entry. But before this survey was executed several entries were made,

under which a part of the defendants claim, and which are embraced in the survey. It becomes, therefore, necessary to determine between these conflicting rights.

The principle is well settled, that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just. Until an entry be surveyed, a subsequent locator must be governed by its calls; and this is the reason why it is essential that every entry shall describe, with precision, the land designed to be appropriated by it. If the land adjoining to the entry should be covered by a subsequent location, it would be most unjust to sanction a survey of the prior entry beyond its calls, and so as to include a part of the junior entry.

This principle is not contested by the complainants, but they deny its application to the case under consideration. They insist that the designation of the number of acres in the survey, below the amount called for in the entry, was a mistake of the surveyor. That it was the intention of Voss to survey his entire entry, as is evidenced by the number of acres actually included in the survey. And the well settled rule is relied on, that surplus land will not vitiate a survey.

The intention of the surveyor can only be known by his official acts, and a resort to these in the present case, will show that he intended only to survey eight thousand five hundred acres, of the ten thousand acres entry. It is true, the lines include a very large surplus; but this, according to the rule stated, does not render the survey void.

The locator may survey his entry into one or more surveys, or he may, at pleasure, withdraw a part of his entry. Where a part of a warrant is withdrawn, the rules of the land office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn. It does not appear that any record of a withdrawal of a part of Voss's entry was made; and from this fact it is argued, that none was intended to be withdrawn.

The question is not exclusively one of intention, or whether any part of this warrant has been withdrawn. If a withdrawal appeared upon the record, it would be conclusive; but must not the right to withdraw fifteen hundred acres of the entry be equally as conclusive as if it had been done. And is not this

right incontrovertibly established by the fact, that only eight thousand five hundred acres of the original entry have been surveyed and patented.

If a mistake was made by the surveyor, why was it not corrected before the emanation of the grant, or at some subsequent period? This might have been done at any time by the holder of the claim.

Whatever may be the facts in regard to a mistake of the surveyor, this court cannot correct it; nor does it prevent the complainants from withdrawing one thousand five hundred acres of the entry, and making a location elsewhere; or perhaps, from still executing the survey for this quantity under the original entry. If in the latter case the right would be barred by the statute of limitations; or in the former it would be ineffectual from the lapse of time or the want of vacant land; the loss is chargeable to the negligence of the complainants, and those under whom they claim.

From this construction of the survey it follows, that the right asserted under it must be limited by the valid entries under which a part of the defendants claim, to the calls of the entry which shall cover the quantity of acres that the surveyor purported to survey. The same construction must be given to the survey as if it had been made on an entry for eight thousand five hundred acres, which, by subsequent locations, was limited strictly to its calls.

As the line of Allen is called for as one of the boundaries of Voss's entry, it is necessary to give a construction to Allen's entry, and ascertain where this line should be established. Allen's entry was not surveyed at the time Voss made his location. This entry calls to "begin at the north west corner of Patton's eight thousand four hundred acres survey, and to run with his line south two hundred and fifty poles, thence down the creek on both sides for quantity; to be laid off in one or more surveys."

The circuit court directed the survey of Allen's entry to be so made, from the base line called for, as that the lines shall include Bare Bone creek, and be parallel to its several courses, &c.

It appears from the survey executed in pursuance of

construction of Allen's entry, that near where the creek falls into the Ohio river, there is a bend in it which renders it impracticable to include the mouth of the creek in the survey; but, with the exception of this bend, the creek is included. As it is impracticable to include the mouth of this creek in the survey, it is insisted by the complainants' counsel, that this survey of the entry is incorrectly made; and that the court should have directed it to be made by running at right angles from the base line for quantity.

In support of this position several authorities have been cited. In the case of Preble v. Vanhoover, 2 Bibb, 120, the court say, "that the call to run eastwardly is an indefinite expression, signifying on which side of the base line the land is to lie; and that a rectangular figure is not to be departed from, unless the calls of the entry are incompatible with that figure."

But in the same case the entry called to include an improvement, and the court decided that the length of the given base and the call to include the improvement being incompatible, the former must yield, so far as necessary, to comply with the latter. In Hardin, 208, the construction of an entry is given by the court of appeals of Kentucky. They say that in the construction of entries it is difficult to lay down general rules, that will not necessarily admit of many exceptions. Each case must frequently depend upon its own peculiar circumstances; but it is evident that every entry itself must be resorted to for discovering the locator's intention, in construing which, the whole entry, like other writings, should be taken together. "But if, from a fair and reasonable exposition of the entry, a call appears to have been made through mistake and is repugnant to the locator's intention, it ought to be rejected, the court say, as surplusage; and not suffered to vitiate the whole entry. Therefore, they say, the object called for should not be so repugnant as to be incapable of misleading a subsequent inquirer with ordinary caution." "It should be practicable to comply with the call; and, in general, it should be a tangible object, either natural or artificial, not a mere ideal one." The court also say, that a certain line should be run south west, "not only because they conceive the locator's intention sufficiently manifest, but because they esteem it a

good rule that the lines of every survey should be as nearly parallel to each other, and as nearly at right angles, as the calls of the entry will admit; and when not controlled by such calls as evidently show the locator's intention to be otherwise, the court will give its calls this construction, as being the most reasonable, and the least subject to exception."

These views contain the general principles which have been established in Kentucky, and by which entries in that state must be governed.

It will be observed, that in giving a construction to an entry the intention of the locator is to be chiefly regarded, the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage, on the ground that it was made through mistake; but if a call be made for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for to control a rectangular figure, that form shall be given to the survey.

These principles must now be applied to the call for the creek in Allen's entry.

It is objected that this creek is not called by any particular name, and the reason no doubt was, that, at the time Allen's entry was made, no name had been given to it. Nor was any name given to the creek on which Patton's entry was made. Subsequent to that entry it was called Patton's creek, from the fact of his entry having been made on its bank.

Barebone creek seems to be a stream of some magnitude; and it does not appear that there is any other creek which answers the call in Allen's entry. This creek is a natural object, and is crossed by the base line of the entry; and could any one doubt the intention of the locator, under such circumstances, to include the land on both sides of the creek by his call "to run down the creek on both sides westwardly, for quantity?" It is true, the mouth of this creek is not included in the survey which was directed by the circuit court, but the mouth of the creek is not called for specifically; and it does not appear, but that if the exact quantity of land called for in the entry had been surveyed, that the creek would have passed through the whole length of the tract. The call is not to run

to the Ohio river, but "down the creek on both sides for quantity."

It would be difficult to make a call more specific than this, or one which would be less likely to mislead any subsequent locator. Is the fact that the creek, by an unusual deviation from its general course, near its junction with the Ohio, passes out of the boundaries designated, calculated to mislead any one? Suppose it passed out of the limits of the survey five or ten poles before the lines closed; would this, by the principles laid down, require the call to be rejected? Could that fact lead any one into error? And unless such a deviation would require the court to reject the call, it cannot be rejected on the ground alleged. The creek, by the survey executed, runs through the tract about seven-eighths of the entire length of the line, and the extraordinary bend which carries it out of the survey, cannot vitiate the call or render it substantially repugnant.

The question which arises out of these facts is, whether this call shall not control the survey, so as substantially to conform to it. The call to run westwardly, having nothing else to control it, would, according to the established rule of construction, require the lines to be run at right angles from the base. But the court are clearly of opinion, that the call to run down the creek on both sides for quantity, must control the survey; and that the construction given to the entry by the circuit court was correct.

This line of Allen's entry being established, it forms the lower boundary of Voss's survey; and it remains only to say that, agreeably to the calls of his entry, the survey must be extended up the river and along Roberts's line, so as to include eight thousand five hundred acres. The survey cannot be extended beyond this limit, so as to interfere with valid entries which were made before the original survey of Voss. This was the construction given to the rights of the complainants under their entry and survey, and this court sustain that construction.

The decree of the circuit court must be affirmed, with costs.

WILLIAM YEATON AND OTHERS, APPELLANTS v. DAVID LENOX AND OTHERS.

Motion to dismiss an appeal. A decree was pronounced by the district court of the United States for the district of Alexandria, in December 1829, from which the defendants appealed, but did not bring up the record. At January term 1832, the appellees, in pursuance of the rule of court, brought up the record and filed it; and on motion of their counsel, the appeal was dismissed. On the 9th of March 1832, a citation was signed by the chief justice of the court for the district of Columbia, citing the plaintiffs in the original action to appear before the supreme court, *then in session*, and show cause why the decree of the circuit court should not be corrected. A copy of the record was returned with the citation, "executed" and filed with the clerk. By the court. The record is brought up irregularly, and the cause must be dismissed.

The act of March 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that an appeal may be prayed in court when the decree is pronounced. But if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

The judicial act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record; the adverse party to have at least twenty days notice. This notice, the court understands, is twenty days before the return day of the writ.

APPEAL from the circuit court of the United States for the county of Alexandria, in the district of Columbia.

Mr Coxe, for the appellees, moved to dismiss this appeal; an appeal in the same having been dismissed at January term 1832, and this appeal not having been taken and filed according to the provisions of the judicial act and the rules of this court.

Mr Neale, contra, who cited the following cases: Reily v. Lamar et al. 2 Cranch, 344, 1 Cond. Rep. 419; Wood v. Lide, 4 Cranch, 180, 2 Cond. Rep. 76; San Pedro v. Valverde, 2 Wheat. 132; Johnson v. Johnson's Administrators, 2 Mun. 304.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

In this case a decree was pronounced by the court of the United States for the county of Alexandria in December 1829, from which the defendants in that court appealed, but did not bring up the record. At January term 1832, the appellees, in pursuance of a rule of this court, brought in the record, filed it, and moved that the suit should be dismissed. The court ordered a dismission. On the 9th day of March 1832, a citation was signed by the chief justice of the court for the district of Columbia, citing the plaintiffs in the original action to appear before the supreme court, then in session, and show cause why the decree of the circuit court should not be corrected.

A copy of the record was returned with this citation "executed," and filed with the clerk. The appellees move to dismiss the suit because the record has been irregularly brought up.

The act of March 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that a decree may be prayed in court when the decree is pronounced; but if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

The judicial act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record; the adverse party having at least twenty days notice. This notice, we understand, is twenty days before the return day of the writ of error.

In this case the appeal is not allowed by the judge, and the citation is to appear before the court then sitting. The record is brought up irregularly, and the cause must be dismissed.

On consideration of the rule granted in this cause, and of the arguments of counsel, as well for the appellants as for the appellees, thereupon had, after mature deliberation, it is the opinion of this court that the record is brought up irregularly, and that this appeal should be dismissed: whereupon, it is ordered and decreed by this court, that the appeal be, and the same is hereby dismissed with costs.

BERNARDO SAMPEYREAC AND JOSEPH STEWART, APPELLANTS v. THE UNITED STATES, APPELLEES.

Construction of the act of congress passed the 5th of May 1830, entitled "an act for the further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th May 1824, and for other purposes."

Under the provisions of an act of congress passed on the 26th May 1824, proceedings were instituted in the superior court of the territory of Arkansas, by which a confirmation was claimed of a grant of land alleged to have been made to the petitioner, Sampeyreac, by the Spanish government, prior to the cession of Louisiana to the United States by the treaty of April 3d, 1803. This claim was opposed by the district attorney of the United States; and the court, after hearing evidence, decreed that the petitioner recover the land from the United States. Afterwards, the district attorney of the United States, proceeding on the authority of the act of 8th May 1830, filed a bill of review, founded on the allegation that the original decree was obtained by fraud and surprise, that the documents produced in support of the claim of Sampeyreac were forged, and that the witnesses who had been examined to sustain the same were perjured. At a subsequent term Stewart was allowed to become a defendant to the bill of review, and filed an answer, in which the fraud and forgery are denied, and in which he asserts that if the same were committed, he is ignorant thereof, and asserts that he is a bona fide purchaser of the land for a valuable consideration, from one John J. Bowie, who conveyed to him the claim of Sampeyreac by deed, dated about the 22d October 1828. On a final hearing, the court being satisfied of the forgery, perjury and fraud, reversed the original decree. Held, that these proceedings were legal, and were authorized by the act of the 5th of May 1830.

Almost every law providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers; it only organizes a tribunal with the powers to entertain judicial proceedings. The act, in terms, applies to bills filed, or to be filed. Such retrospective effect is no unusual course in laws providing new remedies.

The act of 1830 does not require that all the technical rules in the ordinary course of chancery proceedings on a bill of review shall be pursued in proceedings instituted under the law.

In the case of Polk's Lessee v. Wendell, 5 Wheat. 308, it is said by this court, that, on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under a void grant, can acquire nothing.

[Sampeyreac and Stewart v. The United States.]

APPEAL from the supreme court of Arkansas.

The appellant, Sampeyreac, under the act of congress of the 26th of May 1824, entitled "an act enabling the claimants to lands within the limits of the state of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims," exhibited the bill against the United States, which was filed in the clerk's office of the superior court, in the territory of Arkansas, in chancery sitting, on the 21st day of November 1827, stating that, being an inhabitant of Louisiana, he did, on the 6th day of October 1789, address a letter to the governor of the then Spanish province of Louisiana, asking for ten arpens of land in front, with the usual depth, on Strawberry river, within the district of Arkansas, to be granted to him in full property; and that the said governor did, on the 11th day of October 1789, make an order of survey upon said petition, which the appellant alleges is such a claim as might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government of Spain, under which the same originated, had not the sovereignty of the country been transferred to the United States; and is therefore provided for by the treaty between the United States and the French republic, made the 30th April 1803. The bill prays that this claim may be confirmed, according to the provisions of the act of congress before mentioned. Upon this petition the clerk of the court issued a subpœna against the district attorney of the United States, which was executed on the 24th of November 1827. To this bill the district attorney of the United States filed an answer at the December term of said court 1827, denying, generally, the facts and allegations in said bill, and alleging that Sampeyreac was a fictitious person, or was a foreigner, and then dead. On the 19th day of December 1827, the district attorney of the United States moved to postpone the final adjudication of the case until the following term, for the following reasons.

1. The petition and subpœna in this case were served on the United States within one month of the present term of this court, but more than fifteen days allowed by law; and in consequence of this short notice, the United States attorney has not answered this bill until the present term.

2. Has not had a sufficient length of time to take counter depositions, if counter evidence does exist.

3. There are many more cases pending in this court on the same principles, and similarly situated in all respects; and the attorney for the United States asks this continuance for the purpose of procuring such evidence as may exist on the part of the government.

The court proceeded to hear the cause; and, upon the deposition of one John Heberard, entered on that day a decree against the United States, in favour of said Sampeyreac, for four hundred arpens of land.

On the 14th day of February 1828, a deed purporting to be a decree executed by Sampeyreac, transferring his claim to the clerk's certificate of the existence of this decree, and of all his right, title and interest in said decree, to John J. Bowie, was proved and admitted to record on the 22d day of October 1828, in the office of the circuit court of Hempstead county, in the territory of Arkansas, and which title was transferred by Bowie to Joseph Stewart in December 1828; by virtue of which transfer the said Stewart filed with the register of the land office at Little Rock, an application for the N. E. 17, 11 S. 26 W. and E. ½ S. E. 17, 11 S. 26 W. and W. ½ N. E. 13, 11 S. 27 W. and which application was admitted by the register on the 13th of December 1828.

At the April term 1830 of the court, the United States attorney, upon leave granted, filed a bill charging that the decree entered by the court at the December term 1827, in the case of Sampeyreac, was obtained by fraud and surprise, and alleging that the court erred in proceeding to the trial of said cause, at the said December term, without having set said cause for hearing, and without affording the United States time to prove the injustice of the claim. The bill charges that the original petition to governor Mero, and the order of survey are forgeries; which fact has come to the knowledge of the attorney since the decree was made; that Sampeyreac is a fictitious person; or, if he ever did exist, is dead; that Heberard and the other witnesses committed perjury in this case; and that the petition and order of survey were made since 1789; and that record evidence has been discovered since the

decree, which will be produced upon the hearing to prove the forgery.

Sampeyreac was proceeded against as an absent defendant, after the return of the subpœna, that "he was not to be found in the territory of Arkansas;" and a decree pro confesso was entered, as to him, on the 28th day of October 1830. Before this decree was entered, Joseph Stewart was permitted to file his answer and was made a defendant in this case, which was excepted to on the part of the United States, and a bill of exceptions was signed by the court on the 28th October 1830.

It was not charged or contended that Stewart purchased with a knowledge of the forgery, either of the original grant, or of the transfer from Sampeyreac to Bowie.

The final decree, reversing and annulling the decree entered in favour of Sampeyreac at December term 1827, was delivered by the court February 7th, 1831.

From this decree this appeal was taken by Joseph Stewart, for himself and Sampeyreac.

The case was argued by Mr Prentiss and Mr White, for the appellants; and by Mr Fulton and Mr Taney, the attorney-general, for the United States.

For the appellants, the following points were stated for the consideration of the court.

1. That, by the provisions of the act of 1824, and of the act continuing it, the decree of confirmation, rendered in December term 1827, became final after the lapse of one whole year from its date, without an appeal being taken therefrom.

2. That a bill of review cannot be prosecuted after the time for allowing an appeal has expired.

3. That, if the foregoing proposition is not universally true, it so is to a bill of review for errors apparent, and as to which the party could have availed himself by an appeal.

4. If a bill of review can be prosecuted for any cause, after the time for an appeal has expired, it cannot be for causes known to the party at the time of rendering the decree complained of.

5. The refusal of the court to continue the cause at Decem-

ber term 1827, was not an error re-examinable on appeal; or, if so, was an error apparent, which could have been corrected on an appeal, if taken within the year allowed for an appeal; and, therefore, not by a bill of review, after the expiration of the time allowed for an appeal.

6. The substantial ground in difference between the United States and Sampeyreac, supposing there was such a person in being, was, that the order of survey was or was not a genuine one—was or was not a forgery. This was the whole ground of difference; and both this fact and the question whether Sampeyreac was a real inhabitant of Louisiana, capable of taking or had assigned his claim, were all put directly in issue on the original trial.

7. After the decree rendered in the first case, a bill of review cannot be maintained, on after discovered testimony which could have been used under the issue joined, unless such after discovered evidence be evidence of record.

8. Although the bill of review suggests the discovery of such record evidence, none such is produced on the bill of review; the only evidence being that of witnesses and the title papers in the other cases then depending, all of which were known, and, if proper evidence, could have been used on the first trial.

9. All that is alleged in the bill of review, concerning the appearance of the papers themselves, and other facts to show they were post dated, appeared on the first trial.

10. The time of discovery of the new evidence is not stated, nor does it appear; and it is contended that, if such be evidence, discovered after trial, as will sustain a bill of review, the bill must, at least, appear to have been filed within one year from the time of such discovery.

11. If the refusal to continue the cause at December term, was a matter which could be alleged on a bill of review, or considered on an appeal, there was no error in that refusal, as the law only required fifteen days between the service and return of the subpœna, whereas twenty-eight days intervened, and required a trial to be had at the first term, unless good cause should be shown for a continuance; and it is contended that, as the cases were all treated as similar, and it was not alleged that there had not been time to file answers; and as

the United States attorney admitted the credibility of the claimant's witness, and stated that he knew of no testimony which could impeach the genuineness of the claim, he showed no cause of continuance, unless he could show it in the improvident provisions of the act of congress under which he was acting.

12. The defendant Stewart is an innocent purchaser, and is entitled to protection, whether the original claim was a forged one or not. That Sampeyreac, after the decree confirming his claim, conveyed his right to Bowie, appears from his recorded deed read in evidence by consent; and, although they insisted that that deed was a forgery, no evidence of any kind was taken to support that objection. That Stewart was an innocent purchaser, in November or December 1828, is admitted in the fullest terms. "*A purchaser by deed, and in good faith.*"

13. It appears that, being such purchaser in good faith, Stewart made entry of the claim on the 13th December 1828, according to the provisions of the act of 1824. The time for taking an appeal, or for prosecuting a bill of review for errors apparent, expired the 19th December 1828, one year after the decree: and it will be insisted that Stewart had, under his entry, and the operation of the act of 1824, an inchoate legal title; nay, more, a legal title in fact, of which an after acquired patent would only operate as the evidence.

14. It was further contended, that, when Stewart made his entry, he had done all that he could, or was bound to do. It was the duty of the ministerial officers of government to make out his grant.

Before the counsel for the appellants proceeded to argue the case, they admitted that the grant under which Sampeyreac claimed the land was a forgery; that the deed from him to Bowie was a forgery; and that the witnesses who were examined to support the grant had sworn falsely.

Mr Prentiss, for the appellants, contended, that the act of 1824 did not give the superior court of Arkansas any jurisdiction or authority to entertain a bill of review. This is a conclusion warranted by the object of the law, and a fair construction of its terms.

The object of that law was to furnish the means of a speedy and final adjudication upon the Spanish and French land claims in Arkansas and Missouri. To accomplish this, a special jurisdiction was given to the superior court, limited to the particular cases which were to be adjudicated by it; and limited as to the time in which it was to act upon them. The court, having been created by the act, had no other powers than those it derived from its provisions. 6 Peters, 487. Its special jurisdiction does not mingle with, nor was it in any manner increased by the general chancery jurisdiction which it possesses.

The power therefore to entertain a bill of review in the case before the court, cannot be deduced from the general powers of the court, as a court of chancery; but if it exists at all, it is to be sought for only in the act, and the act no where expressly gives it. The court had authority to try titles simply; to direct issues of fact; all of which were useless if it had general chancery jurisdiction. It was, by the fifth section, to decide on claims exhibited within two years; and its decision was to be given in three years. The allowance of an appeal was intended as a substitute for a bill of review; and an appeal is the only mode by which the sentences of the court could be re-examined.

Another argument against the power of the court to entertain a bill of review, may be drawn from the provision which exempts the district attorney from the obligation to make oath to the answer he may file to the petition of a land claimant. If a bill of review was intended to be allowed, would not a similar provision have been made in reference to it? A bill of review, according to chancery rules, must be sworn to.

The proceeding in this case was not under the act of 1830. The bill was filed in April 1830, and the act did not pass until the 10th of May following.

But the act could not operate retrospectively, as it would be unconstitutional. Could it so operate, it would divest private rights acquired in good faith, and under the sanction of a solemn and final decree of the superior court of Arkansas, in a matter fully within its cognizance. By such an operation the law was not remedial, but was an extinguishment of a right. This is contrary to the fifth amendment of the constitution, by which

private property is protected. The private property of Stewart was, by this act, taken away and given to the United States.

The act of May 1830, was the exercise of a judicial power, and it is no answer to this objection, that the execution of its provisions is given to a court. The legislature of the union cannot use such a power. The law violated the contract between the United States and the claimant; a contract entered into under the prior law, and consummated by the decision of the court: and it was equally in opposition to the principles of natural justice as it is to the constitutional declaration. Cited, 1 Aiken, 315; 2 Aiken, 284; 3 Greenleaf, 326; 2 Greenleaf, 287; 11 Mass. 386, 394, 399; 2 Peters, 657; 6 Cranch, 87, 2 Cond. Rep. 308; 7 John. 477.

The proceedings on the part of the United States are not correct, according to the chancery practice, if the court had the power to entertain them.

A bill of review can be maintained in only two cases. 1. Where error is apparent on the record. 2. Where there is some new matter, which has become known subsequent to the decree, which is to be brought into re-examination.

The only error, if any, in the record, was refusing a continuance. This is not the subject of revision. The limitation of a bill of review is the same as a limitation of an appeal; which in this case, under the law of 1824, was one year.

There was no new matter to authorize the bill of review. The rule is, that the new matter must be unknown; and could not, with ordinary diligence, have been known: and the same must be set out in the bill. Hind's Pract. 56, 57, 60; Freeman's Ch. Rep. 30, 177; 16 Vesey, 350; 2 John. Chan. 488; 3 John. Chan. 124; Hardin's Reports, 342; 1 Hopk. Ch. Rep. 102.

The only new matter coming at all within the rule was the forgery of the grant and order of survey; but the bill of review alleges that all these facts appear in the original bill, and so of course were not new. The general allegation that there is new evidence, is not sufficient: the evidence should have been stated. The forgery of these papers was put in issue in the original bill and answer; and the question upon them was judicially closed by the original decree.

Joseph Stewart is an innocent purchaser. He holds the land under the decree of confirmation, and not under a patent. His purchase was made in good faith, and he should not be disturbed; however fraudulent the acts of those who presented the claim for confirmation. He could know nothing but the recorded acts of the court of Arkansas, proceeding under and according to the provisions of the laws of congress in a matter specially entrusted to that court. As the United States ought not to seek from him the restoration of the property taken from them by the frauds of those to whom he as well as the government was a stranger; so this court should not sanction such a claim.

Mr Fulton, for the United States.

The superior court of Arkansas had jurisdiction of the case under the act of 1824, that act having given to the court chancery as well as common law powers. It proceeded in this case according to the rules of a court of chancery.

By the treaty with France of 1803, the United States were bound to protect and confirm private land claims; and for this purpose full powers were given to the court in Arkansas. The titles of the claimants were in a language foreign to the judges of the court: the witnesses to sustain them were unknown to the tribunal, and the whole effort of able counsel was given to establish them. If, in such cases, the courts and the land officers of the government were imposed upon, it was not extraordinary.

An examination of the law of 1828, with reference to the act of 1824, will result in the conviction, that no limitation upon the powers of the court was intended, other than as to the time of filing new claims and petitions. Having general chancery powers in all the cases which came before the court, it could proceed at any time in those cases, according to the principles and practice of courts of chancery.

But if any doubt can be raised upon the act of 1828, the provisions of the act of 1830 relieve the case from every embarrassment. By that act full powers are expressly given to proceed, as was done in the case before the court; and the only question to be decided, in order to maintain the decree of the

court below is, whether the act was constitutional. To show the constitutionality of the law, Calder v. Bull, 3 Dall. 386, was cited; and upon the powers of congress over the territories of the United States, 1 Kent's Com. 360, was referred to.

There are errors on the face of the decree in the original proceedings.

The decree was entered only twenty-five days after the bill was filed, and against the strong resistance of the district attorney; who asked for time to obtain testimony by which the alleged frauds and forgeries might have been discovered. This furnished a sufficient ground for a continuance; and its refusal violated the rules of proceeding established by the court.

There were one hundred and thirty cases of the same description, and which were adjudged at the same time; and in none of them are the laws or ordinances of Spain, upon which the titles rested, set out in the decree of the court.

Fraud is laid as the ground of the bill of review, and this is a sufficient ground for the proceeding. When the court has been grossly and evidently imposed upon, it must necessarily have a power to revise its decree, and correct the errors into which it has been drawn by the deceit and falsehood of a party who has abused its powers to obtain the benefit of his artifices and forgeries.

Nor can the appellant, Stewart, claim any thing under the decree in the original proceeding as an innocent purchaser. The act of congress did not authorize the transfer of any right acquired under the decree. He appears claiming only an equitable title, as he can have no legal title.

Those who claim under a void grant, can acquire no right. Stewart having been altogether unconnected with the decree, can claim under it no more than Sampeyreac, and Sampeyreac could not get a patent for the land. Cited, 1 Harrison's Chan. 452, 140, 146; 3 Wilson, 111; 2 Mad. Chan. 409; 1 Mad. Chan. 237; 1 Johns. Chan. 482; 1 Peters, 517, 542.

The attorney-general contended, that the case was not within the treaty with France, and was not within the cognizance of the court of Arkansas. There was no claim exist-

ing under a grant, no title whatever was in the possession of the party to the proceeding; all the papers were forged, and all the witnesses who swore to the verity of the papers were perjured. These facts are admitted.

Thus the act of congress, having given to the court authority to confirm grants which had issued, and to proceed in the investigation of titles set up under such grants, whatever may have been done by the court under mistake, or from the frauds of those for whom the law was not made; could give no title to any land against the right of the United States. The court had no jurisdiction in such a case. Stewart claimed under Bowie, and it is admited that Bowie's title was a forgery. If Sampeyreac was a real person, the title is yet in him.

It is said the first decree is final and conclusive; that the powers of the court of Arkansas had expired, and no bill of review would lie there; and that congress could not pass a law authorizing a bill of review.

The act of 1828 continues the court as it was before, and also enlarges the time for filing claims. This act could not be considered as creating a new special jurisdiction. It was intended to continue the court with all its powers; and it could of course entertain a bill of review, under the general powers of a court of chancery.

But if the court, under the act of 1824, had no such power, yet, as the United States had a right to the land, which could not be taken away by admitted forgeries, and congress could give a remedy for the injury sustained for such frauds; the act of 1830 is without objection. That a government has such powers, has been decided at this term in the case of Livingston's Lessee v. Moore et al. The case before the court, in this view of it, is, that there was an admitted forgery, and the act of 1830 established a court for the trial of that question.

The next inquiry is, whether the court pursued the remedy the law authorized.

The act of 1830 gives the review generally, and without restricting it to the technical rules of a bill of review in chancery. Congress might prescribe any form of remedy. The review is given on the suggestion of forgery. The review is

given, not technically, but as a rehearing or revision by a proceeding in the nature of a bill of review. The act declares it to be for *revising* the former decrees of the court.

A bill of review may be filed without leave of the court, and without an affidavit. 2 Atk. 532. The want of an affidavit, and the fact that the bill was filed without the previous consent of the court, cannot be taken advantage of on appeal. If the party appears and answers, it is a waiver of the affidavit.

But in point of fact, the bill was filed with the leave of the court. The decree being taken *pro confesso* against Sampeyreac, he admits the allegations in the bill, and of course whatever the affidavit could state. But if Sampeyreac could set up and avail himself of these objections, Stewart cannot do so. Stewart, who brings the case here, has no interest in the lands. He cannot have such an interest through a forgery. The whole proceeding in the name of Sampeyreac was null and void, and could establish no right to be held or enjoyed by any one under the same.

Mr White, for the appellants, in reply.

The questions in this case are, whether the fraud, which is admitted, can be reached by this court; and whether all remedy is not lost to the United States by the lapse of time. There is a difference between the treaty with France of 1803, and that with Spain of 1819. The former does not confirm the grants of land within the ceded territory, the latter confirms them proprio vigore. An examination of the act of 1824 will fully satisfy the court, that unless an appeal has been taken from the decree of a court acting under that law, within one year, the title which has been confirmed by the decree of the court, becomes fixed and completed.

It is denied that the refusal of the court to grant a continuance, as required by the district attorney of the United States, was error. There was no cause shown for the continuance; no direct allegation that evidence could be obtained; and the court were bound by the act of congress to proceed promptly. But the refusal of an inferior court to grant a continuance, is not to be assigned as error in a court of appeals. This is the

exercise of a discretion which cannot afterwards be inquired into.

The certificate given by the court in favour of the party whose title has been confirmed by the court is assignable, and the purchaser may take a patent for the land in his own name. An innocent purchaser has only to look at the decree of confirmation. The steps to procure that, however false or fraudulent, cannot affect him. The universal practice of the government has been to give the patent to the assignee of the certificate.

The bill of review in this case was filed before the act of 1830 passed, and can only be sustained on the law of 1824; and this could not be:

1. Because it was not sworn to. The only privilege given to the United States is, that the answer need not be sworn to.

2. Because it was filed by leave of the court. The original decree must be executed before a bill of review will be allowed, and there must be new matter, not in issue in the original case, for the foundation of such a bill. Here there was none, as the question of forged titles was in issue in the original case.

A bill of review is the exercise of judicial power; and no power exists in congress to give a bill of review to divest a right vested before the enactment of the law. 1 Cond. Rep. 179; Fletcher v. Peck, 6 Cranch.

As to purchasers without notice, cited, 1 Johns. Ch. Cases, 219. As to forged warrants, cited, 5 Wheat. 309.

That Stewart was a necessary party in the case, cited, 10 Wheat. 181; 8 Wheat. 451; 7 Wheat. 522.

Mr Justice THOMPSON delivered the opinion of the Court.

This case comes up on appeal from the superior court in the territory of Arkansas.

The decree of the court was founded upon proceedings instituted under an act of congress, entitled "an act for further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th May 1824, and for other purposes," passed the 8th of May 1830. Pamph. Laws, ch. 90.

This act declares that the act of 1824 (7 Laws U. S. 300)

shall be continued in force, so far as the said act relates to the claims within the territory of Arkansas, until the 1st day of July 1831, for the purpose of enabling the court in Arkansas, having cognizance of claims under the said act, to proceed by bills of review, filed, or to be filed, in the said court on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed in any case on any forged warrant, concession, grant, order of survey, or other evidence of title. And in every case wherein it shall appear to the said court, on the prosecution of any such bill of review, that such warrant, concession, grant, order of survey, or other evidence of title is a forgery, it shall be lawful, and the said court is hereby authorized to proceed, by further order and decree, to reverse and annul any prior decree or adjudication upon such claim; and, thereupon, such prior decree or adjudication shall be deemed and held in all places whatever, to be null and void to all intents and purposes.

Upon the proceedings on the bill of review instituted under this act, the court pronounced the following decree: "it is therefore adjudged, ordered and decreed that the former decree of this court, in favour of the defendant Bernardo Sampeyreac against the United States, for four hundred acres of land, pronounced and recorded at the December term of this court in the year 1827, be, and the same is hereby reversed, annulled and held for naught." From this decree the present appeal was taken.

To a right understanding of the questions which have been made at the bar, it will be necessary briefly to state the proceedings which took place under the original bill.

That bill or petition was filed on the 21st of November 1827, under the provisions of the act of the 26th of May 1824 (7 Laws U. S. 300), setting forth that the complainant Bernardo Sampeyreac, on the 6th of October 1789, he then being an inhabitant of Louisiana, presented a petition to the then governor of the province, asking a grant for a tract of land in full property, containing ten arpens in front, by the usual depth, on

Strawberry river, &c. That afterwards, on the 11th of October 1789, the governor granted the petition. That at the time the grant was so made, an order of survey was issued to the surveyor general of the province. That by virtue of such grant and order of survey, the petitioner acquired a claim to the land; which claim is secured to him by the treaty between the United States and the French republic, of the 30th of April 1803.

The district attorney put in an answer, denying the several facts and allegations in the bill; and alleging that grants could only be made, legally, to persons in existence and actually residing in Louisiana. That Sampeyreac, in whose name the bill is filed, is a fictitious person, never having had any actual existence; or if such person ever had any existence he was a foreigner; or is now dead, and made no transfer or assignment of the claim in his lifetime. That he has no legal representative in existence; nor is there any one now living who is authorized to file this bill, or prosecute this suit: and prayed that the bill might be dismissed.

A witness by the name of John Heberard was examined, and sworn to all the material facts necessary to establish the claim; and the court, thereupon, ordered, adjudged and decreed that the said Bernardo Sampeyreac, recover of the United States the said four hundred arpens of land.

The bill of review is founded upon the allegation that the original decree was obtained by fraud and surprise. That the original petition and order of survey, exhibited in the case, are forged. That Heberard and the other witnesses in the cause, committed the crime of perjury. That the order of survey was never signed by Mero, governor of Louisiana, as the same purports to have been; and that this fact has come to the knowledge of the district attorney since the decree was entered. And the bill further charges that the said Sampeyreac is a fictitious person.

At the October term 1830, this bill was taken, pro confesso, against Sampeyreac: at which term the appellant, Joseph Stewart, appeared in court, and prayed to be made a defendant, and have leave to file an answer to the bill. This was resisted

by the district attorney; but an order was made by the court permitting Stewart to be made a defendant, with leave to file an answer. To which the district attorney excepted.

The answer of Stewart denies the frauds and forgeries alleged in the bill, but avers that if there was any fraud, corruption or forgery, he is ignorant of it; and that he was a bona fide purchaser of the claim for a valuable consideration from one John J. Bowie, who conveyed to him the claim of the said Bernardo Sampeyreac, by deed bearing date about the 22d of October 1828. Upon the final hearing the court reversed the original decree, as has been already stated.

The objections which have been taken at the bar to this decree, may be considered under the following points:

1. Whether, under the act of 1824, the court had authority to entertain the bill of review; and, if not, then,

2. Whether the act of 1830 is a constitutional law, and confers such authority.

3. Whether the proceedings on this bill of review can be sustained under the act of 1830.

4. Whether, admitting Stewart to be a bona fide purchaser of the claim of Sampeyreac, he is protected against the title set up by the United States.

1. We think it unnecessary to go into an examination of the questions which have been made under the first point. Although the act of 1824 directs that every petition which shall be presented under its provisions, shall be conducted according to the rules of a court of equity, it may admit of doubt whether all the powers of a court of chancery in relation to bills of review, are vested in that court. And as the view taken by this court upon the other points renders a decision upon this unnecessary, we pass it over without expressing any opinion upon it.

2. The ground upon which it has been argued that the act of 1830 is unconstitutional, is, that a right had become vested in Stewart before the act was passed; and that the effect and operation of the law is to deprive him of a vested right. To determine the force and application of this objection, it becomes necessary to look at the claim, as it now appears, before the court. It is found by the decree of the court below, and is

admitted at the bar, that Sampeyreac is a fictitious person. That the petition purporting to have been presented by him to Mero, governor of the province of Louisiana, and the order of survey alleged to have been made thereupon, are forgeries. These are the only evidence of title upon which the original claim rests. And it is proved and admitted that the deed purporting to have been given by Sampeyreac to Bowie, under whom Stewart claims, is also a forgery. The bill or petition filed in the original cause, alleges that the claim is secured by the treaty between the United States and the French republic, of the 30th of April 1803. This, however, has not been insisted upon on the argument here; and there is certainly no colour for pretending that a claim founded in fraud and forgery is sanctioned by the treaty. The title to the land in question passed by the treaty, and became vested in the United States; and there has been no act, on the part of the United States, by which they have parted with the title. It is contended, however, that this right or title has been taken away by the original decree in this case, under the act of 1824. By the fourteenth section of that act, all its provisions are extended to the territory of Arkansas; and it is declared that the superior court of that territory shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations in all respects, as is given by the said act to the district court of the state of Missouri. And by the second section of the act, it is declared that in all cases the party, against whom the judgment or decree of the court may be finally given, shall be entitled to appeal within one year from its rendition to the supreme court of the United States, the decision of which court shall be final and conclusive *between the parties;* and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive. No appeal was taken within the year; and the question is, whether the United States, by neglecting to appeal, have lost their right; and if not, whether the remedy provided by the act of 1830, to assert that right, is in violation of the constitution. If Sampeyreac was a real person, and appeared here setting up this objection, it might present a different question; although it is not admitted, even in that case,

that the United States would be concluded as to the right. But the original decree in this case was a mere nullity; it gave no right to any one. The title still remained in the United States; and the most that can be said is, that by omitting to appeal within the time limited by the act, the remedy thereby provided was gone, and the decree became final and conclusive with respect to such remedy. But the act of 1830 provides a new remedy; and it may be added that the act of 1804 declares the decree to be final and conclusive *between the parties*. And as Sampeyreac was a fictitious person, he was no party to the decree, and the act in strictness does not apply to the case. But, considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers. It only organizes a tribunal with powers to entertain judicial proceedings. When the original decree was entered, there was no person in existence whose claim could be ripened into a right against the United States by omitting to appeal. Stewart was not only no party to the decree; but his purchase from Bowie was nearly a year after the decree was entered.

Had Sampeyreac been a real person, having a decree in his favour, and Stewart had afterwards purchased of Bowie the right which that decree established, it might have given him some equitable claim; but it would have been subject to all prior equitable, as well as legal rights. Nor would it be available in any respect in the present case, for Stewart in no manner whatever connects himself with Sampeyreac. As it is admitted that the deed purporting to have been given by Sampeyreac to Bowie is a forgery, Stewart is therefore a mere stranger to this decree, and can derive no benefit from it.

It is said, that if this bill of review was filed under the act of 1830, the court had no jurisdiction; the bill having been filed in April, and the law not passed until the May following. But the act in terms applies to bills filed or to be filed, and of course

cures his defect, if any existed. Such retrospective effect is no unusual course, in laws providing new remedies.

The act of 1803, amending the judicial system of the United States, 3 Laws U. S. 560, declares, that from all final judgments or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court, &c.

It therefore forms no objection to the law, that the cause of action existed antecedent to its passage; so far as it applies to the remedy, and does not affect the right.

3. But it is objected, in the next place, that this bill of review cannot be sustained under the act of 1830. That it was not filed and prosecuted under the limitations and restrictions, and according to the course and practice of a court of chancery in such a proceeding. We think it unnecessary to examine whether all the technical rules required in the ordinary course of chancery proceedings, on a bill of review, have been pursued in the present case. The act clearly does not require it. It authorizes bills of review to be filed on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title. If congress had a right to provide a tribunal in which the remedy might be prosecuted, they clearly had a right to prescribe the manner in which it should be pursued. The great and leading object was to provide for revising the original decree, or granting a new trial. The material allegation required is, that the original decree was founded upon some forged evidence of title; and this is very fully set out in the bill. That it was not the intention of the law, that the court should be confined to the technical rules of a court of chancery on bills of review, is evident from the provision in the last clause of the first section of the act, which directs the court to proceed on such bills of review, by such rules of practice and regulations as they may adopt for the execution of the powers vested or confirmed in them by the act.

4. The next inquiry is, whether the appellant, Stewart, has

acquired a right to the land, by reason of his standing in the character of a bona fide purchaser. The record contains an admission on the part of the United States, that he purchased the claims of John J. Bowie, by deed, for a valuable consideration, in good faith, some time in November or December 1828. But this gave him no right to be let in as a party in the bill of review; he was not a party to the original bill, nor could he connect himself with Sampeyreac, the only party to the bill, he being a fictitious person; and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was, therefore, a perfect stranger to that decree. The deed purporting to have been given by Sampeyreac to Bowie, is admitted to be a forgery. Bowie, of course, had no interest, legal or equitable, which he would convey to Stewart. But admitting Stewart to have been properly let in as a party in the bill of review, the only colourable equity which he showed, was the certificate of entry given by the register of the land office, December 13th, 1828: and this certificate, founded on a decree in favour of Sampeyreac, a fictitious person, obtained by fraud, and upon forged evidence of title. This certificate is entirely unavailable to Stewart. He can obtain no patent under it if the original decree should remain unreversed; for the act of 1830 forbids any patent thereafter to be issued, except in the name of the original party to the decree; and on proof to the satisfaction of the officers, that the party applying is such original party, or is duly authorized by such original party or his heirs to receive such patent. The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States. But Stewart acquired no right whatever under the deed from Bowie, the latter having no interest, that he could convey. In the case of Polk's Lessee v. Wendall, 5 Wheat. 308, it is said by this court, that on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void grant, can acquire nothing.

Upon the whole, we think Stewart was improperly admitted

to become a party: but considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.

The decree of the court below is accordingly affirmed, with costs.

This cause came on to be heard on the transcript of the record from the superior court for the territory of Arkansas, and was argued by counsel: on consideration whereof, it is decreed and ordered by this court, that the decree of the said superior court in this cause be, and the same is hereby affirmed with costs.

JOHN BARRON, SURVIVOR OF JOHN CRAIG, FOR THE USE OF LUKE TIERNAN, EXECUTOR OF JOHN CRAIG v. THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The provision in the fifth amendment to the constitution of the United States, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states.

The constitution was ordained and established by the people of the United States for themselves; for their own government; and not for the government of individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes.

ON a writ of error to the court of appeals for the western shore of the state of Maryland.

This case was instituted by the plaintiff in error against the city of Baltimore, under its corporate title of "The Mayor and City Council of Baltimore," to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation. Craig and Barron, of whom the plaintiff is survivor, were owners of an extensive and highly productive wharf in the eastern section of Baltimore, enjoying, at the period of their purchase of it, the deepest water in the harbour.

The city, in the asserted exercise of its corporate authority over the harbour, the paving of streets, and regulating grades for paving, and over the health of Baltimore, directed from their accustomed and natural course, certain streams of water which flow from the range of hills bordering the city, and diverted them, partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, em-

bankments and other artificial means, purposely adapted to bend the course of the water to the wharf in question. These streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth, which they deposited along, and widely in front of the wharf of the plaintiff. The alleged consequence was, that the water was rendered so shallow that it ceased to be useful for vessels of any important burthen, lost its income, and became of little or no value as a wharf.

This injury was asserted to have been inflicted by a series of ordinances of the corporation, between the years 1815 and 1821; and that the evil was progressive; and it was active and increasing even at the institution of this suit in 1822.

At the trial of the cause in Baltimore county court, the plaintiff gave evidence tending to prove the original and natural course of the streams, the various works of the corporation from time to time to turn them in the direction of this wharf, and the ruinous consequences of these measures to the interests of the plaintiff. It was not asserted by the defendants that any compensation for the injury was ever made or proffered; but they justified under the authority they deduced from the charter of the city, granted by the legislature of Maryland, and under several acts of the legislature conferring powers on the corporation in regard to the grading and paving of streets, the regulation of the harbour and its waters, and to the health of the city.

They also denied that the plaintiff had shown any cause of action in the declaration, asserting that the injury complained of was a matter of public nuisance, and not of special or individual grievance in the eye of the law. This latter ground was taken in exception, and was also urged as a reason for a motion in arrest of judgment. On all points, the decision of Baltimore county court was against the defendants, and a verdict for four thousand five hundred dollars was rendered for the plaintiff. An appeal was taken to the court of appeals, which reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals, prosecuted a writ of error to this court.

The counsel for the plaintiff presented the following points:

The plaintiff in error will contend that apart from the legislative sanctions of the state of Maryland and the acts of the corporation of Baltimore, holding out special encouragement and protection to interests in wharves constructed on the shores of the Patapsco river, and particularly of the wharf erected by Craig and the plaintiff, Barron; the right and profit of wharfage, and use of the water at the wharf for the objects of navigation, was a vested interest and incorporeal hereditament, inviolable even by the state, except upon just compensation for the privation; but the act of assembly and the ordinance of the city are relied on as enforcing the claim to the undisturbed enjoyment of the right.

This right was interfered with, and the benefit of this property taken away from the plaintiff by the corporation, avowedly, as the defence showed, for public use; for an object of public interest—the benefit more immediately of the community of Baltimore, the individuals, part of the population of Maryland, known by the corporate title of the Mayor and City Council of Baltimore. The "inhabitants" of Baltimore are thus incorporated by the act of 1796, ch. 68. As a corporation they are *made liable to be sued*, and authorized to sue, to acquire and hold and dispose of property, and, within the scope of the powers conferred by the charter, are allowed to pass ordinances and legislative acts, which it is declared by the charter shall have the same effect as acts of assembly, and be operative, provided they be not repugnant to the laws of the state, or the constitution of the state, or of the United States. The plaintiff will contend, accordingly:

1. That the Mayor and City Council of Baltimore, though viewed even as a municipal corporation, is liable for tort and actual misfeasance; and that it is a tort, and would be so even in the state acting in her immediate sovereignty, to deprive a citizen of his property, though for public uses, without indemnification: that regarding the corporation as acting with the delegated power of the state, the act complained of is not the less an actionable tort.

2. That this is the case of an authority exercised under a

state; the corporation appealing to the legislative acts of Maryland for the discretional power which it has exercised.

3. That this exercise of authority was repugnant to the constitution of the United States, contravening the fifth article of the amendments to the constitution, which declares that "private property shall not be taken for public use without just compensation;" the plaintiff contending that this article declares principles which regulate the legislation of the states, for the protection of the people in each and all of the states regarded as citizens of the United States, or as inhabitants subject to the laws of the union.

4. That under the evidence, prayers, and pleadings in the case, the constitutionality of this authority exercised under the state must have been drawn in question, and that this court has appellate jurisdiction of the point, from the judgment of the court of appeals of Maryland, the highest court of that state; that point being the essential ground of the plaintiff's pretension in opposition to the power and discretion of the corporation.

5. That this court in such appellate cognizance is not confined to the establishment of an abstract point of construction, but is empowered to pass upon the right or title of either party; and may, therefore, determine all points incidental or preliminary to the question of title, and necessarily in the course to that inquiry; that consequently the question is for this court's determination whether the declaration avers actionable matter, or whether the complaint is only of a public nuisance; and on that head the plaintiff will contend that special damage is fully shown here within the principle of the cases where an individual injury resulting from a public nuisance is deemed actionable; the wrong being merely public only so long as the loss suffered in the particular case is no more than all members of the community suffer.

Upon these views the plaintiff contends that the judgment of the court of appeals ought to be reversed.

The counsel for the plaintiff in error, Mr Mayer, on the suggestion of the court, confined the argument to the question whether, under the amendment to the constitution, the court had jurisdiction of the case.

The counsel for the defendants in error, Mr Taney and Mr Scott, were stopped by the court.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the judicial act.

The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favour of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective

governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress: others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no state shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on

the people would apply to the state government, unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects entrusted to the general government, or in which the people of all the states feel an interest.

A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects entrusted to the government of the union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves. A con-

vention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the govern-

ment of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

This cause came on to be heard on the transcript of the record from the court of appeals for the western shore of the state of Maryland, and was argued by counsel: on consideration whereof, it is the opinion of this court that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that state, and the constitution of the United States; whereupon, it is ordered and adjudged by this court that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

HARLES VATTIER, APPELLANT v. THOMAS S. HINDE, JAMES B. HINDE, MARTHA HINDE, AND JOHN M. HINDE, INFANTS, &c.

bill was filed in the circuit court of Ohio, claiming a conveyance of certain real estate in Cincinnati from the defendants, and after a decree in favour of the complainants, and an appeal to the supreme court, the decree of the circuit court was reversed, because a certain Abraham Garrison, through whom one of the defendants claimed to have derived title, had not been made a party to the proceedings, and who was, at the time of the institution of the same, a citizen of the state of Illinois, although the fact of such citizenship did not then appear on the record. Afterwards, a supplemental bill was filed in the circuit court, and Abraham Garrison appeared and answered, and disclaimed all interest in the case: whereupon the circuit court, with the consent of the complainants, dismissed the bill as to him. By the court. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of others, its jurisdiction may be exercised as to them. If, when the cause came on for hearing, Abraham Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him, if such decree could have been pronounced as to them without affecting his interests. No principle or law is perceived which opposes this course. The incapacity of the court to exercise jurisdiction over Abraham Garrison, could not affect their jurisdiction over other defendants, whose interests were not connected with his, and from whom he was separated, by dismissing the bill as to him.

The cases of Nollan et al. v. Torrance, 9 Wheat. Rep. 537; Connolly et al. v. Taylor, 2 Peters, 556; and Cameron v. M'Roberts, 3 Wheat. Rep. 591, cited and affirmed.

It is the settled practice in the courts of the United States, if the case can be decided on its merits, between those who are regularly before them, although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties if they had been amenable to its process, that these circumstances shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States; provided the decree may be made without affecting their interests. This rule has also been adopted by the court of chancery in England.

Where the new parties to a proceeding in chancery are the legal representatives of an original party, and the proceedings have been revived in their names, by the order of the court on a bill of revivor; the settled practice is to use all the testimony which might have been used if no abatement

had occurred. The representatives take the place of those which they represent, and the suit proceeds in a new form, unaffected by the change of name.

Agreements had been made, under which depositions taken in other cases where the same questions of title were involved, should be read in evidence, and on the hearing in the circuit court these depositions were read: afterwards, on an appeal to this court, the decree of the circuit court was reversed, and by the decree of reversal the parties were permitted to proceed de novo. When the case was again heard in the circuit court the defendant objected to the reading of the depositions, asserting that the decree of reversal annulled the written certificate of the parties for the admission of testimony. By the court. The consent to the depositions was not limited to the first hearing, but was co-extensive with the cause. The words in the decree of reversal, that the parties may proceed de novo, are not equivalent to a dismission of the bill without prejudice; nor could the court have understood them as affecting the testimony in the cause; or setting aside the solemn agreement of the parties. The testimony is still admissible to the extent of the agreement.

The rules of law respecting a purchaser without notice, are formed for the protection of him who purchases a legal estate, and pays the purchase money without a knowledge of the outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully, only, to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity.

The bill set forth a title in B. H., the wife of T. H., by direct descent from her brother to herself, and insisted on this title to certain real estate. The answer of the defendants resisted the claim, because the land had been conveyed by the complainants before the institution of the suit to A. C. The complainant in his replication admitted the execution of the deed to A. C., but averred that it was made in trust to reconvey the lot to T. H., to be held by him for the use and benefit of B. H., his wife and her heirs, and to enable T. H. to manage and litigate the said rights; and that A. H., in execution of the trust, made a deed to T. H. The deed was recorded, and was exhibited, but it did not state the trust. The rules of the court of chancery will not permit this departure in the replication from the statements of the bill.

The act for regulating processes in the courts of the United States, provides that the forms and modes of proceeding in courts of equity, and in those of admiralty and maritime jurisdiction, shall be according to the principles, rules and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law, subject, however, to alterations by the courts, &c. This act has been generally understood to adopt the principles, rules and usages of the court of chancery of England.

APPEAL from the circuit court of the United States for the district of Ohio.

This case was before the court at January term 1828, 1 Peters, 241, on an appeal by the parties who are now appellants. The court, at that term, reversed the decree of the circuit court of Ohio, because a certain Abraham Garrison had not been made a party in that court; and the cause was remanded "with instructions to permit the complainants, the appellees, to amend their bill and to make proper parties, and to proceed *de novo* in the cause from the filing of such amended bill, as law and equity might require."

In the circuit court an amended bill was filed, making Abraham Garrison a party, and the parties proceeding to a final hearing, a decree was rendered in favour of the complainants, from which decree the defendants appealed to this court.

The case was argued by Mr Caswell for the appellant; and by Mr Ewing and Mr Clay for the appellee.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This suit was originally brought in the court of the United States for the seventh circuit and district of Ohio, sitting in chancery, by Thomas S. Hinde and Belinda his wife, for the conveyance of a lot of ground in the town of Cincinnati, designated in the plan of the town by the number 86.

The bill alleges that Abraham Garrison, under whom all parties claim, sold and conveyed the said lot of ground to William and Michael Jones, as is proved by his receipt in the following words. "Received, Cincinnati, 10th September 1790, of William and Michael Jones, fifty pounds thirteen shillings and three pence, in part, of a lot opposite Mr Coun's in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for, on or before the 20th day, this instant.

"Signed, ABRAHAM GARRISON.

"Test, JACOB AWL."

That a deed was executed the succeeding day, which has been lost. That on the 26th of March 1800, William Jones, acting for and in the name of William and Michael Jones, conveyed the lot to Thomas Doyle, Jun. then an infant; and

that his father, Thomas Doyle, took possession of it in the name of his son, and retained possession until his death; that the said Thomas Doyle, Jun. having survived both his parents, died under age in the year 1811, leaving the plaintiff, Belinda, his sister by the mother's side, and heir at law.

The bill then alleges, that in the year 1814 the plaintiff, Thomas S. Hinde, in right of his wife, took possession of the said lot and placed a tenant on it; after which, in the year 1819, he obtained a deed of confirmation from William Jones.

The bill further charges, that James Findley, Charles Vattier, Robert Ritchie, William Lytle, George Ely and William Dennison, knowing the title of the plaintiffs, but discovering that the deed from Garrison to William and Michael Jones was lost, have procured a deed from Garrison to some one of them, and have turned his tenant out of possession The plaintiffs have commenced an ejectment against the tenants in possession, but are advised that they cannot support it. They therefore pray for a conveyance, for discovery and for general relief.

The receipt of Abraham Garrison to William and Michael Jones, and the deed of William, purporting to convey for Michael and himself, with the deed of confirmation executed by Michael, are filed as exhibits. The record also contains a deed of John C. Symmes, dated the 31st of July 1795, conveying the lot to Abraham Garrison. The deed from Jones to Doyle is in the name of William and Michael Jones, and is signed W. and M. Jones; but concludes, "in witness whereof the said William Jones hath hereunto set his hand and seal, the day and year first above mentioned."

James Findley answers, that having obtained a judgment for a large sum against Charles Vattier, the lot 86, with other real property to a large amount, was transferred to him in the year 1807 in satisfaction thereof, and possession of the lot was given. In the year 1815 he was informed that Abraham Garrison claimed the lot, and on searching the record, could find no conveyance from him for it. He purchased it from Garrison for the sum of seven hundred dollars, on condition of his conveying twenty-three feet, part thereof, to Abraham Garri-

son, Jun., the son of the vendor. Conveyances were executed in pursuance of this contract. Previous to this purchase, he understood that Thomas Doyle was once the owner of the lot, that it had been sold at a sheriff's sale as his property, and purchased by Charles Vattier. When he purchased, Garrison assured him that he had never sold the lot; and his inquiries among the old settlers respecting the sale to William and Michael Jones, were answered by assurances that they knew nothing more than report, that Thomas Doyle had claimed the lot, and that it was sold by the sheriff as his property. Never heard that the plaintiff, T. S. Hinde, had been in possession. In April 1818, on a compromise with Charles Vattier, he conveyed to him all his interest in the lot.

The deed from Findley to Vattier is made in consideration of one dollar, and a final settlement of all claims.

The answer of Charles Vattier states, that in the year 1800 the lot was advertised by the sheriff of Hamilton county to be sold under execution, issued on a judgment he obtained against Thomas Doyle, at which sale he became the purchaser, at the price of twenty dollars. Neither the return of the sale, nor the deed made to him by the sheriff can be found. He has no other knowledge of the title of Thomas Doyle, than that the lot was called his. He held possession under the sale, until James Findley became possessed thereof in 1807. In the year 1818 James Findley conveyed the lot to him for a valuable consideration, after which he conveyed to William Lytle.

The answer of William Lytle states that he purchased part of the lot 86 from Charles Vattier in 1818, for fifteen thousand four hundred dollars. He had no knowledge of the claim of Thomas Doyle, Jun. Some time before the purchase, he had heard that Mr Hinde had taken possession of some lots claimed by Thomas Doyle, deceased, but does not recollect which lots.

The answer of Robert Ritchie states, that he is a purchaser for a valuable consideration, without notice of that part of the lot No. 86, which was conveyed by James Findley to Abraham Garrison, Jun.

Sundry depositions were taken and exhibits filed, after which the cause came on to be heard, and the court decreed Charles

Vattier and Robert Ritchie severally to convey to the plaintiffs the parts they respectively held of the lot 86. From this decree the defendants appealed to this court.

On a hearing the decree was reversed, because Abraham Garrison was not made a party; and the cause was remanded to the circuit court with directions to permit the plaintiffs to amend their bill, and make Abraham Garrison a party, and to proceed de novo.

On the return of the cause to the circuit court, the death of the plaintiff, Belinda, being suggested, the suit was revived as to her heirs; and a bill of revivor, and an amended and supplemental bill was filed, making Abraham Garrison a party.

The bill, after reciting the matter of the original bill, and stating the death of Belinda Hinde without issue, whereby the plaintiff, T. S. Hinde, became entitled to a life estate, as tenant by the courtesy, and the other plaintiffs, who are infants, were entitled as the only issue and heirs of the said Belinda; prays that the suit and all the proceedings in it may stand revived and be prosecuted by the said Thomas, for himself, and for them as their next friend. The bill then charges, that James Bradford, Thomas Doyle and John Bradshaw were brother officers; that Bradshaw executed a voluntary bond to Thomas Doyle, the son of Thomas Doyle, binding himself to convey to him two hundred and fifty acres of land, part of a large tract, which is very valuable. This bond was delivered to Thomas Doyle, the father, for the benefit of his son, who afterwards sold the land to Samuel C. Vance for a large sum of money, which he received. To indemnify his son, he procured the lot No. 86 to be conveyed to him. This intention was declared at the time. He was then indebted, but not insolvent. Cincinnati then contained not more than one hundred inhabitants, and this transaction was generally known. After the execution of the bond to T. Doyle, the son, J. Bradshaw departed this life leaving a will in which he devised his whole estate to T. Doyle the elder. The estate of the father descended to his son, and on his death to his half sister Belinda, after which the plaintiff, T. S. Hinde, confirmed the sale to Vance.

After T. Doyle, the father, had taken possession of lot No.

86 for his son, sundry lots in Cincinnati were sold as his property under execution, some of which were purchased by Vattier; but lot 86 was not among them.

It remained open and unimproved until 1814, when the plaintiff, T. J. Hinde, took possession, and placed a tenant on it.

Vattier, erroneously supposing himself to have purchased this lot 86 among others, examined into the title, and must have become fully apprized of the title of T. Doyle the younger, as the deed from Jones to him was on record, and recites the deed from Garrison to Jones. In consequence of this, he took depositions in perpetuam rei memoriam, to prove that the consideration of the deed to the son moved from the father.

About the year 1807, Vattier, being largely indebted to Findley, transferred to him a large quantity of property, among which lot 86 was supposed to be included. It is understood that no money passed on this arrangement between Vattier and Findley, nor were the relations of the parties changed.

Findley examined into the title and became acquainted with its history from the recorder, T. Henderson. He determined to acquire the legal title from Garrison, which he did acquire at the price of seven hundred dollars, and the conveyance of twenty-three feet, part of the lot, to the son of the vendor. The lot was then worth thirty thousand dollars.

In 1818 Findley and Vattier readjusted their affairs, and lot No. 86, so far as Findley retained the title, was reconveyed to Vattier. He sold to Lytle for fifteen thousand dollars, who never paid any money; and the contract has been cancelled. The bill prays for a discovery and for a conveyance.

The answer of Abraham Garrison acknowledges the sale and conveyance to William and Michael Jones, and the receipt of the purchase money. He admits the receipt filed in the cause. He was induced to make the conveyance to Findley, by the assurance that the equitable title was already in him. He disclaims all title or interest, and prays to be dismissed.

The defendant, Garrison, having disclaimed all interest, and it appearing that he was a citizen of Illinois; and the defendants, who purchased the twenty-three feet of land, sold by Findley to Abraham Garrison, Jun., having filed their answers denying notice; and the plaintiffs admitting that notice could

not be fixed on them; the court, with the consent of the plaintiffs, decreed that the bill be dismissed as to them.

The answer of Charles Vattier states, the amendment of the bill, by which Garrison was made a party, and the subsequent dismission of the bill as to him; wherefore, he prays that the whole bill may be dismissed.

He does not admit that Belinda Bradford was the heir at law of James Bradford, or that she was born in lawful wedlock; nor does he admit the marriage of Thomas Doyle with the mother of the said Belinda, or the birth of T. Doyle, Jun.

He denies that the said Belinda was the heir of T. Doyle, Jun. He admits the conveyance of the lot from John Cleves Symmes in 1795 to A. Garrison, and that some contract was made by Garrison with W. and M. Jones, and that W. and M. Jones sold their equitable title to T. Doyle, who took possession in his own right, and not in right of his son. The consideration moved from the father; consequently, if the conveyance was made to the son, he held in trust for his father.

The deed from Jones was made, he says, to the son fraudulently, for the sole purpose of defrauding creditors. He denies that the father was indebted to the son. He denies that the lot lay open and unimproved. It was in possession of the defendant, who made some small improvements on it.

He obtained a judgment against the elder Doyle in February 1801, upon which an execution issued, which was levied on lot 86. An inquest summoned to ascertain the value of the premises, returned that Thomas Doyle was seised of lot No. 86, and that its clear yearly value was twelve dollars. A writ of venditioni exponas was issued, which was stayed by supersedeas; but the judgment was affirmed: after which the lot was sold under execution, and the defendant, Vattier, became the purchaser. There having been lots sold on the same day, the sheriff conveyed to Mr Barnet the lot sold to the defendant, and to the defendant the lot sold to Mr Barnet. The mistake was corrected by Mr Bennet, so far as his own interest was concerned, but was neglected by the defendant.

Some time after his purchase, he heard of the claim of young Doyle, and on being told by Jones that the purchase money

was paid by the father, he took depositions to perpetuate testimony.

He denies that Belinda, the late wife of T. S. Hinde, was the heir of T. Doyle, Jun.

He admits that upon a final settlement with Findley, the lot was reconveyed to him at the price of fifteen thousand dollars. He also admits the sale to Lytle, and a reconveyance of the property, the purchase money not having been paid.

The same defendant afterwards filed an amended answer, in which he states, that at the time of filing the original bill, Belinda Hinde, the plaintiff, whose right was asserted therein, had no title to the lot 86. That on the 5th day of October 1814, she, with her husband, Thomas S. Hinde, executed and delivered to Alexander Cummins, a deed of bargain and sale, whereby they conveyed the said lot to him in fee simple, which deed was recorded in the court of Hamilton county, a copy of which is exhibited with the answer.

In their replication the plaintiffs admit the execution of the deed set forth in the amended answer, but aver that if the deed was sufficient in law to transfer the estate of the said Belinda in the premises, which they do not admit, it was intended to vest the same in the said Alexander, in trust to reconvey the same to the said Thomas, to be held by him in trust for the use and benefit of the said Belinda and her heirs; and for this purpose the said Alexander did, on the 5th day of October 1814, reconvey the said lot to the said Thomas. And afterwards, in March 1815, did execute another deed for the same purposes, which last mentioned deed was properly recorded in Hamilton county.

The defendants rejoin to this replication.

On a hearing, the court dismissed the bill as to Lytle and Findley, they appearing to have no interest in the premises; and decreed that Charles Vattier do, within sixty days, release to the plaintiffs so much of lot 86 as was conveyed to him by James Findley. From this decree the defendant, Charles Vattier, appealed to this court.

The counsel for the appellant assigns several errors in the decree. The first is, that the court had no jurisdiction, the de-

fendant Garrison being a citizen of the state of Illinois. He contends that, in suits between citizens of the United States, all the parties on one side must be citizens of the state in which the suit is brought; and that the jurisdiction of the court depends on the state of parties at the institution of the suit. In support of this proposition he cites Nollan et al. v. Torrance, 9 Wheat. 537. In that case, a plea to the jurisdiction averred that the plaintiff and defendant *are* both citizens of the state of Mississippi. On demurrer this plea was held ill, because the jurisdiction of the court depended on the state of the parties at the institution of the suit, and not at the time of the plea pleaded.

The same objection was made, and the same case cited in support of it, in Connolly et al. v. Taylor et al., 2 Pet. 556. In that case the court said, "where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit." But this principle was not supposed to be applicable to a suit brought by or against several individuals, whose names were struck out during its progress. In the case of Connolly et al. v. Taylor et al. the plaintiffs were aliens and a citizen of Pennsylvania. The defendants were citizens of the state of Kentucky, in which the suit was brought, except one who was a citizen of Ohio. As between the citizen of Pennsylvania and of Ohio, the court, sitting in Kentucky, could exercise no jurisdiction. "Had the cause," said the court, "come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction." The name of the citizen of the United States, who was originally a plaintiff, was, however, struck out before the cause came to a hearing, and the jurisdiction was sustained.

This case is, we think, in point. A decree between all the original parties could not have been made. Those plaintiffs who had a right to sue all the defendants, had in their bill united with themselves a person between whom and one of the defendants the court could not take jurisdiction. By striking out his name, the impediment was removed, and the jurisdiction between the other parties remained as it would have stood had his name never been inserted in the bill. The

court could perceive no objection founded in convenience or in law to this course.

It is impossible to draw a distinction, so far as respects jurisdiction, between striking out the name of a plaintiff and of a defendant. The citizen of Ohio may have been a more necessary party in the cause than the citizen of Pennsylvania. Had it been otherwise, the same principle which sustained the one alteration would have sustained the other.

In the case of Cameron v. M'Roberts, 3 Wheat. 591, John M'Roberts, a citizen of Kentucky, filed his bill in the court of the United States against Charles Cameron, a citizen of Virginia, and other defendants, without any designation of their citizenship. The defendants appeared and answered, and a decree was pronounced for the plaintiff. Upon a motion to set aside the decree, and to dismiss the suit for want of jurisdiction, the judges were divided in opinion on the following points, which was certified to this court.

"Had the district court jurisdiction of the cause as to the defendant Cameron and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone?"

The certificate of this court was, that if a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

The other defendants were represented, on the motion, to be citizens of Kentucky; but this is of no importance, since the jurisdiction of the court was as much affected by the omission to aver that they were aliens or citizens of some other state, as it would have been by the averment that they were citizens of Kentucky.

This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of the others, its jurisdiction may be exercised as to them.

If then, when this cause came on for hearing, Abrahan

Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him, if such decree could have been pronounced as to them without affecting his interests.

We perceive no principle of reason or law which opposes this course. The incapacity of the court to exercise jurisdiction over Garrison could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated by dismissing the bill as to him.

The second error assigned is attended with more difficulty. It is, that Abraham Garrison is a necessary party, without whom a decree ought not to be made. This objection derives additional force from the fact, that the former decree was reversed because he had not been made a party. Did the case now appear under precisely the same circumstances as at the former hearing, the same decree would undoubtedly be now pronounced. But it is insisted by the counsel for the appellees, that circumstances have so changed as to require a different decision. It did not appear in the record, as formerly brought up, that Garrison was not within the jurisdiction of the court. This circumstance is undoubtedly entitled to great consideration, and has always received it. It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, to decree as between them. Although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties had they been amenable to its process, this circumstance shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting those interests.

In the case of Osborn et al. v. The Bank of the United States, 9 Wheat. 738, this point was made and relied on by the appellants. A tax had been imposed by the legislature of Ohio on the Bank of the United States, which had been forcibly levied by the officer employed to collect it. A bill was filed against this officer, and against the auditor and treasurer of the state, praying that the money might be restored to the bank, the act imposing the tax being unconstitutional. The

process was served while the money was yet in the hands of the officer. The court decreed the restoration of the money, and the defendants appealed. The appellants insisted that the state of Ohio was the party really interested; that the treasurer, auditor, and collecting officer were its agents; and that no decree could be made unless the principal could be brought before the court.

This court admitted the direct interest of the state, and added, "had it been within the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank." The jurisdiction of the court was sustained, and the decree affirmed.

This is a stronger case than that under consideration. The money in contest would have been paid into the treasury of the state, had the bill been dismissed for want of proper parties. The decree arrested the money in its progress to the treasury, and restored it to the bank. All must admit that the state ought to have been made a party, had it been amenable to the process of the court. Yet this direct interest did not restrain the court from deciding the merits of the cause between the parties before it.

In the case at bar, Abraham Garrison has no claim, legal or equitable, to the property in contest. No decree could be made against him, and he has filed his answer disclaiming all interest in the cause. It is true that his answer is not evidence as an answer, since the court had no jurisdiction as to him. But in a question concerning himself only; in a question whether the court will abstain from exercising its jurisdiction between parties, in some of whom the whole title in law and equity is vested, lest his interests should be affected; his disclaimer of all interest, appearing in the form in which it appears, cannot be disregarded.

The rule that the court will proceed, although persons interested are not parties, if those persons are not within its jurisdiction, has been adopted also by the court of chancery in England. There, as here, the general rule is that "all persons materially interested in the subject ought to be parties, in order to prevent a multiplicity of suits, and that there may be a

complete decree between all parties having material interests; but this being a general rule, established for the convenient administration of justice, is subject to some exceptions, introduced from necessity, or with a view to practical convenience. "Thus," continues Mr Maddock (vol. 2, p. 142), "where persons interested are out of the jurisdiction of the court, and it is stated so in the bill and proved, it is not necessary to make them parties."

Had the case on the former hearing appeared as it now appears; had it been then known as it is now known, that making Garrison a party would turn the plaintiffs out of court, and that he disclaimed all interest in the cause; had these facts appeared in the former record; we think the decree would not have been reversed for the cause assigned for its reversal. We are therefore of opinion that the court committed no error in making their decree between the remaining parties, after the bill had been dismissed as to Abraham Garrison.

These preliminary objections being removed, we proceed to consider the rights of the parties.

A question has been made respecting the admissibility of great part of the testimony on which these rights depend.

Before the original decree was made, while the cause was depending in the circuit court, the parties, by their counsel, filed a consent in writing for the admission of all the testimony which had been taken in several suits which were depending between some of the same parties, relative to the same controversy, in all the suits both in law and equity. Under this agreement all the depositions were read without objection, at the hearing of the cause. When the decree then pronounced was reversed, and the cause remanded, the counsel for Vattier objected to such of the depositions as were not regularly taken; and now allege, in support of the objection, that the consent was no longer binding. That the order to proceed de novo was equivalent in effect to dismissing the bill without prejudice; and that new parties are brought into the cause.

The only really new party was Abraham Garrison, and the testimony was never used for or against him. The bill, as to him, was dismissed before the cause came to a hearing. The

new parties plaintiffs are the representatives of Belinda Hinde, an original plaintiff, and the proceedings are revived in their names by the order of the court on their bill of revivor. Under such circumstances, the settled practice is to use all the testimony which might have been used had no abatement occurred. The representatives take the place of those whom they represent, and the suit proceeds in its new form unaffected by the change of name.

The reversal of the original decree cannot annul the written consent of parties for the admission of testimony. That consent was not limited in its terms to the first hearing, but was co-extensive with the cause. The words in the decree of reversal, that the parties may proceed de novo, are not equivalent to a dismission of the bill without prejudice; nor could the court have understood them as affecting the testimony in the cause, or as setting aside the solemn agreement of the parties. The testimony, therefore, is still admissible to the extent of that agreement.

As the appellees claim under Thomas Doyle, Jun., the first inquiry is into the validity of his title.

It is derived, as is stated in the original bill, from Abraham Garrison, who sold to William and Michael Jones. This sale is proved by the receipt given for the purchase money, which receipt also contains a stipulation for a conveyance.

An objection is made to its admission in evidence, because it has not been proved by the subscribing witness. Some affidavits were filed, which state that after diligent inquiries at his former place of residence, no intelligence could be obtained respecting him, nor had he been heard of for many years. These affidavits are also objected to, because not regularly taken on notice.

The validity of this objection need not be examined, because the receipt is more than thirty years old, and is not only free from suspicion, but is supported by other testimony. In such a case the subscribing witness may be dispensed with. Bul. Nisi Prius, 255; 1 Starkie's Law of Evidence, 342. This paper vests an equitable title in William and Michael Jones. The bill alleges that a deed in pursuance of it was soon afterwards executed, and there is much reason to believe that the

allegation is true; but the deed is lost, and the proof of its existence is not thought sufficient to establish it.

In March 1800, a deed was executed by William Jones, for and on behalf of his partner Michael and himself, conveying the lot 86 to Thomas Doyle, Jun.

The appellants insist that this deed is fraudulent; that the consideration moved from Thomas Doyle the father; and that the conveyance was made at his instance to his son, then an infant, for the purpose of protecting the property from the creditors of the father, who was then insolvent.

The appellees insist that the money paid, was in truth the money of the son then in the hands of the father, and that the transaction was a fair one. They admit that Thomas Doyle, Sen. was indebted, but not insolvent. The bill states that the money of the son came to the hands of his father, in the following manner.

John Bradshaw, the intimate friend and brother omcer of Thomas Doyle, being an old bachelor without near relations, executed a voluntary bond to the son of his friend, for two hundred and fifty acres of valuable land, part of a larger tract, which he deposited with the father for the use of the son. This statement is corroborated by the will of Bradshaw, in which he gives the residue of the land, and all his other property to Thomas Doyle. What is denominated a bond, is in substance a deed poll. It describes the tract of land, of which the two hundred and fifty acres it purports to convey are a part; and then, for a valuable consideration, bargains and sells the said two hundred and fifty acres to Thomas Doyle, Jun. son of major Thomas Doyle, a major in the service of the United States. This bond or deed is attested by two witnesses, and bears date the 7th day of January 1794. The handwriting of one of the subscribing witnesses who is dead, is proved; and a witness testifies that he has heard nothing concerning the other, though he has made inquiry for him. The hand writing of Bradshaw is also proved.

On the 17th of May 1796, Thomas Doyle, the father, made the following assignment of this instrument. "In consideration of four hundred dollars to me in hand paid, I sign over in behalf of my son, Thomas Doyle, Jun., my right and title to the within

mentioned tract of land, and obligate myself in the penalty of six hundred dollars, that when he becomes of sufficient age, that he will sign over his right and title of the same, agreeable to law." Signed, Thomas Doyle. The payment of the consideration money specified in the assignment is proved.

Thomas Doyle, then, was, in May 1796, indebted to his son for money received to his use, in the sum of four hundred dollars. Although the son might, when of age, have refused to receive this money, and have asserted his title to the two hundred and fifty acres, had the tract of which it was a part, remained the property of his father the devisee of Bradshaw, or of a purchaser with notice, yet he was not compellable to assert it; and, his title not being on record, he could not have asserted it against a purchaser without notice. Thomas Doyle the son then was a bona fide creditor of his father, for the sum of four hundred dollars. The circumstances under which this debt was created, or the relationship between the parties, cannot render it less sacred.

In March 1800, Thomas Doyle, being thus indebted to his son, directed the conveyance of lot No. 86, to be made to him, declaring at the time, that it was made in consideration of the debt he owed for his son's land sold to Vance. Had this transaction been in favour of any other creditor than a son, its fairness could never have been impeached. Had he, as guardian for any other person, secured a debt under the same circumstances, the helpless infancy of the ward would not have tainted the transaction with fraud. The connexion between the parties may excite suspicion, may justify a more scrutinizing investigation of all the circumstances; but if the result of this investigation be, as we think it is, that the conveyance was in payment of a debt of the most sacred obligation, a debt which a conscientious debtor ought to have paid, it is valid in law. The consideration mentioned in the deed, is three hundred and fifty dollars, and it is not suggested that the lot was worth more than that sum.

This deed could pass only the interest of William Jones. But it purported to convey the interest of both partners. The presumption arising from the language of the deed and the connexion between the parties, that the land was considered as

an article of merchandize, and supposed to be conveyed as such an article, is strengthened, if not confirmed by the deed of confirmation afterwards made by Michael Jones, the other partner and joint owner of the lot, and by his deposition which states that the purchase was made by William, the acting partner, who directed the conveyance to be made to the firm.

This being the title of Thomas Doyle, Jun., we are next to inquire whether it has descended on Belinda, the plaintiff in the original suit, and his sister on the part of the mother.

The plaintiffs make two objections to her title.

1st. That she was not born in lawful wedlock, and was therefore incapable of taking lands by descent.

2d. That if legitimate, she could not inherit this from her half brother; because she is not of the blood of the first purchaser.

1. Belinda was the daughter of James and Margaret Bradford. Several witnesses testify that they lived together as man and wife, acknowledged each other in that character, and were reputed to be lawfully married. The will made by Mr Bradford, after being mortally wounded, bequeathes one half of his estate to his wife, Margaret Bradford, "now pregnant;" and the other half to his child "of which" she was then pregnant.

To this testimony the appellant opposes some rumours that they were married by a military officer, a person not authorized to perform the ceremony.

We cannot hesitate on this question. Belinda Bradford, the child mentioned in the will of her father, must unquestionably be considered as legitimate.

2. It is alleged that she could not inherit this lot, unless Thomas Doyle, Jun. died before the enactment of a law which limited the inheritable capacity of the half blood to the blood of the first purchaser; and the appellants insist that this fact is not proved.

The court has not inquired into it, because Thomas Doyle, Jun. is himself the first purchaser, and may transmit the lot to his half sister, whether on the part of the father or mother. The plaintiff Belinda then succeeds to all the rights of Thomas Doyle, Jun. in the lot in controversy.

We are next to inquire how those rights are affected by the title of the appellants.

Charles Vattier, the appellant, claims under a sale made in 1802, by the sheriff of Hamilton county, by virtue of an execution issued on a judgment obtained against Thomas Doyle, which he says was levied on lot No. 86. At this sale he alleges that he was the highest bidder, and, as such, became the purchaser. The sheriff made the deed on the 14th of July 1828. The consideration expressed is ninety dollars.

The appellees do not admit the fact that this lot was really sold as the property of Thomas Doyle. The testimony, which would seem to be conclusive, that this lot was sold as alleged by Vattier, is repelled by circumstances of great weight. But, admitting this fact to be completely established, its influence in the cause is countervailed by the circumstance that Thomas Doyle had no semblance of title in law or equity to the lot on which the execution was levied. The deed of William Jones, in the name of William and Michael Jones, conveying the lot to Thomas Doyle, Jun., was recorded in March 1800. If persons were not bound to notice this deed because the title of Jones did not appear on the record, still there was no trace of title from any person whatever to Thomas Doyle. This sale, then, was totally unauthorized, and could convey nothing. No title being in Vattier, he could convey none to Findley. If then, at any time before the deed from Garrison to Findley, a controversy had arisen respecting the title to this lot between the heirs of Thomas Doyle, Jun. and Charles Vattier or his vendee, each claiming a conveyance of the legal title, the decision must have been in favour of Doyle's heirs. They had, if not the legal right, a complete equitable title, to which no single objection could be made.

Was the conveyance from Garrison to Findley made under circumstances which ought to defeat this title?

Charles Vattier having become largely indebted to James Findley, this lot with other property is said to have been transferred to him in 1807, in part satisfaction of the debt. The conveyance, if any was made, is not adduced; nor have we any satisfactory evidence, if one was made, that it included this lot. It is not pretended that any money was paid in con-

sequence of this arrangement. Some considerable time after it, Findley, having become fully apprized of the defect in his title, and of the conveyance to Thomas Doyle, Jun., applied to Garrison, and, in 1815, obtained a conveyance from him. He afterwards conveyed this property to Vattier. If Vattier can now be deemed a purchaser without notice, his title cannot be disturbed.

It is not alleged that either Vattier or Findley was without knowledge of the rights of the appellees when the legal title was acquired. It is contended that they acquired the property and paid the purchase money without this knowledge, and might therefore conscientiously protect themselves by getting in the legal estate.

Let this allegation be examined.

In 1802 Vattier purchased the title of Thomas Doyle, the elder, who had no title whatever. Whether he knew that a conveyance had been made to Thomas Doyle, the younger, or not, is immaterial. He could acquire nothing. The principle *caveat emptor* is completely applicable.

The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity. Vattier's original purchase, then, cannot avail him, because he was bound to notice the equity of Doyle. But there is, we think, much reason to believe that he had actual notice of that equity; or, at any rate, was informed of circumstances which ought to have led to such inquiry as would have obtained full notice.

The title of Garrison, under whom Doyle was supposed to claim, is presumed by the law to have been known to Vattier. He ought to have inquired into it. In his answer, he says, "he has been informed and believes that some kind of a contract was made by the said Abraham Garrison with William and Michael Jones for the sale to them of the lot aforesaid." He does not state the time when this information was obtained, nor is there any reason to believe that it was subsequent to his

purchase. He also admits his information and belief that W. and M. Jones sold their right to Thomas Doyle the elder, who paid them the full consideration for the same, and took in his own right, and in the right of his son. He does not say when this information was obtained. He says he had no other knowledge of the title of Thomas Doyle to the lot than its being called his, and being sold as his. These circumstances lead to the opinion that this information was received anterior to his purchase.

In so small a society as was then settled in Cincinnati, it is not probable that the title of Thomas Doyle the son, which was of record, should have been unknown. It would, most probably, be the subject of conversation. But be this as it may, a purchaser was bound to make inquiries from Garrison. Had the lot been sold as the property of Garrison, full notice of the equity of Jones and of Doyle would be required to defeat the rights of the purchaser; but, being sold as the property of Thomas Doyle, Sen., the purchaser was bound to inquire into his title. In making these inquiries, Vattier, if he then possessed a knowledge of the sale to Jones; and if he did not, he ought to have been more explicit in his answer; should have searched for a conveyance from Jones to Doyle. He must have found one from Jones to Thomas Doyle, Jun. Under these circumstances, Vattier ought to have taken notice of the prior equity of Doyle. If he did not, he is chargeable with negligence.

But it has been argued, that Findley purchased what he supposed to be a legal title, and might protect himself after discovering his mistake.

Several answers have been given to this argument.

The lot was understood to have been sold as the property of Thomas Doyle, Sen., and the sheriff's deed to Vattier stated it to be sold as the property of John C. Symmes, under an execution against him. Symmes had no title. If it was actually sold as the property of T. Doyle, Sen., he could show no semblance of title. James Findley, therefore, was bound to know that he received from Vattier a property to which the vendor had no other right than was given by possession. He was, consequently, bound to take notice of all existing equities, and

could not maintain his possession against them. Had he been about to make a purchase, he must have examined the title of Vattier, and must have discovered that he had none. Upon such examination, the deed from Jones could scarcely have escaped his notice.

Findley had paid no money for the lot. The character of the transaction between Vattier and himself is not explained. A new arrangement of all their affairs appears to have taken place, by which this lot was returned. Previous to this new arrangement, he had full notice of the title of the appellees, and with this notice purchased from Garrison at a great undervalue. It is not alleged, nor can we presume that he was driven to this purchase as the only refuge to protect himself from loss. Had such an allegation been made, it would require an examination of the contract and transactions between himself and Vattier; but it is not made.

Upon a full consideration of all the circumstances under which Findley bought from Garrison, we cannot consider him as entitled to that protection which a court of equity affords to a man who purchases a legal title and pays the purchase money, without notice of an equity existing against the property which had been sold to him. At the time of acquiring the legal title, he had full notice of the equity of the appellees; and we do not think he has shown himself to have been placed in a situation which would justify his procuring a conveyance from Garrison. If he was not himself protected against the equity of Doyle's representatives, he could communicate no protection to Vattier, who had himself full notice.

The conveyance to Lytle, and the reconveyance from him, cannot affect the case, because no money was paid.

If, then, the case of the appellees had been correctly stated in their bill, we should have thought them entitled to the relief for which they prayed. But it was not correctly stated. The bill sets forth a title in Belinda, the wife of Thomas S. Hinde, by direct descent from her brother to herself, and insists on this title.

The answer resists the claim because the land had been conveyed by the plaintiffs, before the institution of their suit,

to Alexander Cummings. The plaintiffs, in their replication, admit the execution of the deed to Cummings, but aver that it was made in trust to reconvey the same rights to the said Thomas, to be held by him in trust for the use and benefit of the said Belinda and her heirs, and to enable the said Thomas the more conveniently to manage, litigate and protect the said rights; and that the said Alexander Cummings did afterwards, in execution of the said trust, make a deed to the said Thomas, which is recorded in the proper county. The deed referred to is exhibited, but expresses no trust for the wife and her heirs.

Will the rules of the court of chancery permit this departure in the replication from the statements of the bill?

It is well settled that a decree must conform to the allegations of the party, as well as to his proofs. The answer, supported as it is by the deed to Cummings, would have put the plaintiffs out of court, had they not made a new case in their replication. Ought not this case to have been made in their bill, and can the omission to make it be supplied by averments in the replication?

The act for regulating processes in the courts of the United States, vol. 2, p. 299, enacts, that "the forms and modes of proceedings" in courts of equity and in those of admiralty and maritime jurisdiction, shall be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law;" subject, however, to such alterations, &c.

This act has been generally understood to adopt the principles, rules and usages of the court of chancery of England. By the principles, rules and usages of that court, the plaintiffs, in such a case as this, must have amended their bill. 2 Mad. Ch. 275, 286; Mitf. Pl. 256. They could not have been permitted to make a new case in their replication.

The act permits this court to prescribe rules for the practice of the circuit courts. Rules have been prescribed in pursuance of this power, but they allow a special replication to be filed only with leave of the court. This replication was filed without leave, and is consequently not saved by the rule. We think it obviously proper that the real case should have been stated in the bill, and that the decree ought not to have been

pronounced in the actual state of the pleadings. For this fault we are of opinion that the decree ought to be reversed, and the cause remanded, with directions to permit the plaintiffs to amend their bill.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel: on consideration whereof, this court is of opinion, that to entitle themselves to the decree which was pronounced in their favour, the plaintiffs in the circuit court ought to have stated their case truly in their bill as it now appears on the record, and that after the amended answer was filed, showing the deed from Thomas S. Hinde and Belinda his wife to Alexander Cummings, the plaintiffs ought to have obtained leave to amend their bill, so as to introduce into it the reconveyance from Alexander Cummings to Thomas S. Hinde, on the trusts agreed on between the parties, instead of alleging this new matter in their replication. This court is further of opinion that the circuit court ought not to have pronounced its decree, and that for this cause the decree ought to be reversed, and is hereby reversed, so far as it directs a conveyance to be made by the appellant, Charles Vattier, and the cause is remanded to the circuit court, with directions to permit the plaintiffs to amend their bill.

CHARLES A. DAVIS, CONSUL-GENERAL OF THE KING OF SAXONY, PLAINTIFF IN ERROR v. ISAAC PACKARD, HENRY DISDIER AND WILLIAM MURPHY, DEFENDANTS.

The record of the proceedings in this case, brought up with the writ of error to the court for the correction of errors of the state of New York, showed that the suit was commenced in the supreme court of the state of New York, and that the plaintiff in error, who was consul-general of the king of Saxony, did not plead or set up his exemption from such suit in the supreme court; but, on the cause being carried up to the court for the correction of errors, this matter was assigned for error in fact; notwithstanding which, the court of errors gave judgment against the plaintiff in error. The court of errors of New York having decided that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment of the court of errors was reversed.

As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789 gives to the district courts of the United States, *exclusively of the courts of the several states*, jurisdiction of all suits against consuls and vice-consuls, except for certain offences enumerated in the act.

It has been repeatedly ruled in this court, that the court can look only to the record to ascertain what was decided in the court below.

Matter assigned in the appellate court as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law. The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.

If a consul, being sued in a state court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by writ of error, claims the privilege, such an omission is not a waiver of the privilege. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered; it is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations; and our constitution and law seem to put consuls on the same footing in this respect.

If this privilege or exemption was merely personal, it can hardly be supposed that it would have been thought sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy, doubtless, led to the provision. It was deemed fit and proper, that the courts of the government, with

which rested the regulation of foreign intercourse, should have cognizance of suits against the representatives of such foreign governments.

The action in the supreme court of New York against the defendant, was on a recognizance of bail, and it was contended that this was not an original proceeding, but the continuance of a suit rightfully brought against one who was answerable to the jurisdiction of the court in which it was instituted, and in which the plaintiff in error became special bail for the defendant; and therefore the act of congress did not apply to the case. Held, that the act of congress being general in its terms, extending to all suits against consuls, it applied to this suit.

A suit on a recognizance of bail is an original proceeding. A scire facias upon a judgment, is to some purposes only a continuation of the former suit. But an action of debt on a judgment is an original suit.

An action of debt on a recognizance of bail may be brought in a different court from that in which the original proceedings were commenced.

ERROR to the court for the correction of errors of the state of New York.

The defendants in error, Isaac Packard and others, instituted a suit in the supreme court of judicature of the state of New York against Isaac Hill and Ralph Haskins; and at August term 1824 of that court, Charles A. Davis, the plaintiff in error, entered into a recognizance as special bail of Isaac Hill. Judgment having been obtained against the defendant, Isaac Hill, in that suit, the plaintiffs in the same, Isaac Packard and others, brought an action of debt on the recognizance in the same court, against Charles A. Davis, as bail, to January term 1830.

To this action Mr Davis appeared by attorney, and upon several issues of fact and in law judgment was rendered against him, at May term of the court, for four thousand five hundred and thirty-eight dollars and twenty cents debt, and four hundred and sixty-nine dollars and nine cents damages and costs. Upon this judgment Mr Davis prosecuted a writ of error to the court for the correction of errors for the state of New York.

In the court for the correction of errors, the plaintiff assigned as error, "that he, the said Charles A. Davis, at the time of the commencement of the suit of the said Isaac Packard, Henry Disdier and William Murphy against him the said Charles A. Davis, was, and ever since hath continued to be, and yet is, consul-general of his majesty the king of Saxony,

in the United States, duly admitted and approved as such by the president of the United States. That being such, he ought not, according to the constitution and law of the United States, to have been impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States; and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognizance of the said cause: therefore, in that there is manifest error. And this he, the said Charles A. Davis, is ready to verify: wherefore, he prays that the judgment aforesaid, for the error aforesaid, may be revoked, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the judgment aforesaid."

To this assignment of errors the defendants in the court for the correction of errors filed the following plea.

"And the said Isaac Packard and others, defendants in error, before the president of the senate, senators, and chancellor of the state of New York, in the court for the correction of errors, at the city hall of the city of New York, by David Dudley Field, their attorney, come and say, that there is no error in the record and proceedings aforesaid, nor in the giving of the judgment aforesaid; because they say, that it no where appears by the said record, proceedings or judgment, that the said Charles A. Davis ever was consul of the king of Saxony; and they pray that the said court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matters aforesaid above assigned for error, and that the judgment aforesaid may be in all things affirmed. But because the court aforesaid is not yet advised what judgment to give of and concerning the premises, a day, therefore, is given to the said parties here, wheresoever, &c. to hear their judgment thereon, for that the said court is not yet advised thereof."

"Whereupon, the said court for the correction of errors, after having heard the counsel for both parties, and diligently examined and fully understood the causes assigned for error, and inspected the record and process aforesaid, did order and adjudge, that the judgment of the supreme court be in all things affirmed; that the plaintiff take nothing by his writ, and that

the defendants go without day; that the defendants in error recover against the plaintiff in error their double costs in defending the writ of error in this cause, to be taxed, and also interest on the amount recovered, by way of damages, and that the record be remitted, &c.

"Therefore it is considered by the said court for the correction of errors, that the judgment of the supreme court aforesaid, be, and the same is hereby in all things affirmed. It is further considered that the said defendants in error recover against the plaintiff in error their double costs, according to the statute in such case made and provided, to be taxed in defending the writ of error in this cause, and also interest on the amount recovered, by way of damages. And hereupon, the record aforesaid, as also the proceedings aforesaid in this same court for the correction of errors in the premises had, are to the said supreme court, wheresoever the same may be held, remitted, &c."

Upon this judgment, Mr Davis brought the case before this court by a writ of error.

At the January term 1832, the counsel for the defendants in the writ of error, Mr R. Sedgwick, moved to dismiss the writ of error for want of jurisdiction. Mr White having appeared for the plaintiff in error, the motion, after argument, was dismissed. 6 Peters's Reports, 41.

The case now came on for argument on the following points, presented for the consideration of the court, by Mr White, for the plaintiff in error.

1. The plaintiff in error being a foreign consul, the supreme court of New York had no jurisdiction of the case.

2. The defect of the jurisdiction was not cured by appearing and pleading to the action.

3. The court for the correction of errors in New York erred in not receiving the plea of the plaintiff in error, and in giving a judgment against him.

4. The judgment of the court for the correction of errors, being the highest court of the state, and against the rights, privilege and exemption claimed by a consul, ought to be re-

versed and set aside; because it was in violation of the constitution and laws of the United States.

Mr White cited, 6 Peters, 45; 2 Laws of New York, 166, 601; 1 Binney, 138; 6 Wheat. 558; 12 John. 493, 469; 4 Wash. C. C. Rep. 482; 3 Dall. 475; 9 East, 447; 2 Peters, 157; 3 Peters, 202, 207.

To show that the action of debt on a recognizance of bail was an original suit, he cited, 3 Petersdorf's Abridg. 210; 3 Salk. 205; 4 Term Rep. 355; 2 Saunders, 71, a.; Tidd's Pract. 1099; 2 Archbold's Pract. 86; 2 Marsh. 232; 1 Dow. and Ryl. 126; 4 Eng. Com. Law Rep. 360; 16 Eng. Com. Law Rep. 126; 18 Eng. Com. Law Rep. 212; 1 Chitty's Rep. 713; 7 John. 318; 9 John. 80; 12 John. 459; 13 John. 424.

Mr R. Sedgwick submitted to the court a printed argument for the defendants in error, in which the following points were urged for the consideration of the court.

1. The court of errors had not jurisdiction of the question raised by the writ of error to this court.

2. No decision was made by that court upon any question mentioned in the twenty-fifth section of the judiciary act. Cited, Tidd's Pract. 1055, 1056; 3 Wend. 180; 2 Cowen, 50; 2 Wend. 145; 4 Wend. 179; 5 Revisors' Reports, 69.

The suit below having been on a recognizance of bail, was properly brought in the supreme court. Cited, 3 Maule and Sel. 385, 386; 6 T. R. 365; 1 Mason, 436; 3 Dall. 475.

The recognizance of bail is the commencement of the proceedings in regard to the bail. The court then had jurisdiction over the defendant, it not appearing that he was then consul; and this jurisdiction could not be taken away by any subsequent appointment of defendant as consul. Cited, 4 Wash. C. C. R. 482; 3 Dall. 475.

The defendant below should have pleaded to the jurisdiction. Cited, Bac. Ab. Error K. 5; Hills v. Martin, 19 John. 33; Mad. and Geld. 375; 6 Wend. 329; 1 Peters, 498.

Mr Justice THOMPSON delivered the opinion of the Court.

The writ of error in this case brings up for review, a judgment recovered against the plaintiff in error in the court for the correction of errors, in the state of New York. The case was before this court at the last term (6 Peters, 41), on a motion to dismiss the writ of error for want of jurisdiction. This court sustained its jurisdiction under the twenty-fifth section of the judiciary act, on the ground that the decision in the state court was against the exemption set up by the plaintiff in error; viz. that he being consul-general of the king of Saxony in the United States, the state court had not jurisdiction of the suit against him. The principal difficulty in this case seems to grow out of the manner in which the exemption set up by the plaintiff in error, was brought under the consideration of the state court, and in a right understanding of the ground on which the court decided against it.

As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c. And the judiciary act of 1789 (2 Laws U. S. sec. 9) gives to the district courts of the United States, *exclusively of the courts of the several states*, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The record sent up with the writ of error in this case, shows that the suit was commenced in the supreme court of the state of New York; and that the plaintiff in error did not plead or set up his exemption in that court, but on the cause being carried up to the court for correction of errors, this matter was assigned for error in fact; notwithstanding which the court gave judgment against the plaintiff in error.

It has been argued here, that the exemption might have been excluded by the court for the correction of errors, on the ground that it was waived by not having been pleaded in the supreme court. It is unnecessary to decide definitively whether, if such had been the ground on which the judgment of the state court rested, it would take the case out of the revising power of this court under the twenty-fifth section of the judiciary act; for we cannot say, judging from the record, that the judgment

turned on this point; but, on the contrary, we think the record does not warrant any such conclusion.

It has been repeatedly ruled in this court, that we can look only to the record to ascertain what was decided in the court below. The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. And it is the judgment of the court of errors, and not of the supreme court, with which we have to deal.

Looking then to the record, we find that when the cause went up, upon a writ of error from the supreme court, to the court for the correction of errors, it was assigned as error in fact, that Charles A. Davis, before and at the time of commencing the suit against him, was, and ever since has continued to be, and yet is, consul-general of his majesty the king of Saxony, in the United States, duly admitted and approved as such by the president of the United States.

The record shows no objection to the time and place, when and where this matter was set up, to show that the supreme court of New York have not jurisdiction of the case. The only answer to this assignment of errors is, that there is no error in the record and proceedings aforesaid, nor in the giving the judgment aforesaid, *because it no where appears by the record*, proceedings or judgment, that the said Charles A. Davis ever was consul of the king of Saxony.

This was no answer to the assignment of errors. It was not meeting or answering the matter assigned for error. It is not alleged in the assignment of errors that it does appear, by the proceedings or judgment in the supreme court of New York, that Charles A. Davis was consul of the king of Saxony.

Matter assigned in the appellate court, as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law.

Suppose infancy should be assigned as error in fact; would it be any answer to say, that it no where appeared by the record, that the defendant in the court below was an infant.

The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.

But the answer to the assignment of errors prays that the

court for the correction of errors may proceed to examine the record and proceedings aforesaid, *and the matters aforesaid above assigned for error.*

Under this informal state of the pleadings in the court for the correction of errors, how is this court to view the record? The most reasonable conclusion is, that the court disregarded matters of form, and considered the answer of the defendants in error as a regular joinder in error. And this conclusion is strengthened when we look at the form of the entry of judgment. "Whereupon the said court for the correction of errors, after having heard the counsel for both parties, and diligently examined and fully understood *the causes assigned for error*," &c. affirms the judgment.

The only cause assigned for error was, that Charles A. Davis was consul-general of the king of Saxony; and the conclusion must necessarily follow, that this was not, in the opinion of the court, a sufficient cause for reversing the judgment. If it had been intended to say it was not error, because not pleaded in the court below, it would probably have been so said. Although this might not perhaps have been strictly technical, yet as the court gave judgment on the merits, and did not dismiss the writ of error, it is reasonable to conclude, that the special grounds for deciding against the exemption set up by the plaintiff in error, would have been in some way set out in the affirmance of the judgment.

If any doubt or difficulty existed with respect to the matters of fact set up in the assignment of errors, the court for the correction of errors was, by the laws of New York, clothed with ample powers to ascertain the facts.

The statute (2 Laws N. Y. 601) declares, "that whenever an issue of fact shall be joined upon any writ of error returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ or the proceedings thereon; the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties to try such question of fact, at the proper circuit court or sittings; and to certify the verdict thereupon to the court for the correction of errors."

No such issue having been directed, we must necessarily conclude that no question of fact was in dispute; and as the record contains no intimation that this matter was not set up in proper time, the conclusion would seem irresistible, that the court for the correction of errors considered the matter itself, set up in the assignment, as insufficient to reverse the judgment. This being the only question decided in that court, is the only question to be reviewed here: and viewing the record in this light, we cannot but consider the judgment of the state court in direct opposition to the act of congress, which excludes the jurisdiction of the state courts in suits against consuls.

But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the supreme court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect.

If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments. That it is not considered a personal privilege in England, is evident from what fell from lord Ellenborough in the case of Marshall v. Critico, 9 East, 447. It was a motion to discharge the defendant from arrest on common bail on the ground of his privilege under the statute 7 Ann, ch. 12, as being consul-general from the Porte. Lord Ellenborough said, this is not a privilege of the person, but of the state he represents, and the defendant having been divested of the character

in which he claims that privilege, there is no reason why he should not be subject to process as other persons; and the motion was denied on this ground.

Nor is the omission to plead the privilege deemed a waiver in England, as is clearly to be inferred from cases where application has been made to discharge the party from *execution*, on the ground of privilege under the statute of Ann, which is considered merely as declaratory of the law of nations; and no objection appears to have been made, that the privilege was not pleaded. 3 Burr. 1478, 1676.

It may not be amiss barely to notice another argument which has been pressed upon the court by the counsel for the defendants in error, although we think it does not properly arise upon this record.

It is said the act of congress does not apply to this case, because, being an action upon a recognizance of bail, it is not an original proceeding, but the continuation of a suit rightfully commenced in a state court.

The act of congress is general, extending to all suits against consuls; and it is a little difficult to maintain the proposition, that an action of debt upon recognizance of bail is not a suit.

But we apprehend the proposition is not well founded; that it is not, in legal understanding, an original proceeding.

It is laid down in the books, that a scire facias upon a recognizance of bail is an original proceeding, and if so, an action of debt upon the recognizance is clearly so. A scire facias upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit.

It is argued, that debt on recognizance of bail, is a continuation of the original suit, because, as a general rule, the action must be brought in the same court. Although this is the general rule, because that court is supposed to be more competent to relieve the bail when entitled to relief, yet, whenever from any cause the action cannot be brought in the same court, the plaintiff is never deprived of his remedy, but allowed to bring his action in a different court, as where the bail moves out of the jurisdiction of the court. This is the settled rule in the state of New York; and it is surely a good reason for bring-

ing the suit in another court, when the law expressly forbids it to be brought in the same court where the original action was brought. 2 Wil. Saund. 71, a; Tidd's Practice, 1099, 6th ed.; 2 Archb. Prac. 86, book 3, ch. 3; 7 Johns. 318; 9 Johns. 80; 12 Johns. 459; 13 Johns. 424; 1 Chit. Rep. 713; 18 Common Law Rep. 212, n. a.

But the reversal of the judgment in this case is put on the ground that from the record we are left to conclude, that the court for the correction of errors decided that the character of consul-general of the king of Saxony, did not exempt the plaintiff in error from being sued in the state court.

Judgment reversed.

This cause came on to be heard on the transcript of the record from the court for the trial of impeachments and correction of errors for the state of New York, and was argued by counsel: on consideration whereof, it is the opinion of this court, that the plaintiff in error being consul-general of the king of Saxony, exempted him from being sued.

UNION BANK OF GEORGETOWN v. GEORGE B. MAGRUDER.

Whether certain facts in reference to an alleged notice to the indorser, and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law for the consideration of the jury.

The court are entirely satisfied with their former decision in the case of the Union Bank of Georgetown v. Magruder, 3 Peters's Rep. 87.

ERROR to the circuit court of the United States for the county of Washington, in the district of Columbia.

The case is fully stated in the opinion of the court.

For the plaintiffs in error, Mr Key cited, Wynn v. Thornton, 12 Wheat. 183; Lonsdale v. Brown, 4 Wash. C. C. R. 149; 4 Dall. 109; 3 Peters, 187; 7 East, 231; Chitty on Bills, 234, 202, 211, 236; 1 Esp. Rep. 303; 15 East, 222; 2 Greenleaf's Rep. 207.

Mr Coxe, for the defendant in error, cited, 1 Dane's Abridg. 118; Bell v. Morrison, 1 Peters, 360; 12 Wheat. 186; 2 T. R. 713; 3 Bibb, 102; 1 Saunders on Plead. and Ev. 117, 118, 119, 141; 3 T. R. 635.

Mr Justice STORY delivered the opinion of the Court.

This cause was formerly before the court upon a writ of error to the circuit court of the district of Columbia, sitting for the county of Washington. The judgment then rendered was reversed (Magruder v. Union Bank of Georgetown, 3 Peters's Rep. 87); and a venire facias de novo awarded; upon which a new trial having been had, the cause is again before us upon a bill of exceptions taken by the plaintiffs at the last trial.

The action is brought by the plaintiffs, as indorsers, to recover the contents of a promissory note made on the 8th of November 1817, by George Magruder, deceased, whereby he promised, seven years after date, to pay to George B. Magruder, the defendant, six hundred and forty-three dollars and twenty-one cents, with interest, for value received, and which was indorsed before it became due by the defendant to the plaintiffs.

There are several counts in the declaration. The first is founded on the liability of the defendant as indorser, and avers that the maker of the note died before the note became due, and the defendant took administration on his estate; and after the note became due, to wit, on the 11th day of November 1824, due demand of payment was made of the defendant as administrator, who refused to pay the same, and, having due notice, became liable to pay the same. The second count alleges, that when the note became due, the same not having been demanded of the maker, nor protested for non-payment, and notice not having been given to the defendant (the defendant being before, and when the same became due, the administrator of the maker), and the defendant, well knowing that the same had not been paid, afterwards, on the 15th of November 1824, in consideration thereof, and in further consideration that the plaintiffs would not bring suit on the note against him as indorser, but would give time to him for the payment thereof (not saying for what time, or for a reasonable time), the defendant promised that he would ultimately, and in a reasonable time pay the same to the plaintiffs. Then follow the common money counts.

The bill of exceptions is in the following words·

"In the trial of this cause the plaintiffs, to support the issues on their part, offered a competent witness, Alexander Ray, who proved, that two or three days after the note fell due, he had a conversation with defendant, asked him if he could arrange the note; that if he did not, probably the officers of the bank would be blamed; he said no officer should lose any thing by him, and that there was some property on Cherry street, which witness understood that George Magruder in his lifetime owned: that he would repair it, and that it would become valuable. Mr Thompson had had a previous conversation with him; the defendant had not been informed by me that the note was over due, and not demanded. Also James Thompson, who proved that as soon as it was discovered that the note was over, he and the cashier conversed about it; and about three or four days after it was over due, he determined to call on defendant, and request him to arrange it, and state

the circumstances attending the note; that he then called on defendant, and found him from home; left word he wanted him, and a day or two after defendant called at bank; he went aside with him, told him the circumstances attending the neglect in relation to the note, and requested him to take time and determine what he would do as to arranging the note; telling him that he did not wish defendant to say a word to him to commit himself, but to consider whether, if he did not arrange it, the bank might not do him a greater injury than the amount of the note: that some time after this conversation, he had another with defendant; that the defendant asked him, if the debt was lost, whose loss would it be; would it fall on any of the officers of the bank? Witness replied that he did not know how that would be, that he could not answer that question; that the bank would, perhaps, look to the officers; and the defendant then said, no officer of the Union Bank should lose any thing by him: that he afterwards had another conversation with defendant in Mr Wharton's store; that defendant said "he meant to pay the note, but would take his own time for it; that he would not put himself in the power of the bank." He thinks this last conversation was about three or four months after the note fell due. That just before the suit was brought, the witness was desired by the president of the bank, to call on the defendant, and know what he meant to do with the note; that he did so, and that defendant then said, "I will pay that note now, if the bank will take the house on Cherry street for what it cost me." Witness reported the answer to the president, who said the bank did not want the house, and shortly afterwards suit was brought. Plaintiffs further proved that the defendant, when the note fell due, and before, was administrator of the drawer of the note, George Magruder: who had died before the note fell due, and who, it is also admitted, was insolvent.

"Whereupon, the plaintiffs, on the aforegoing evidence, prayed the court to instruct the jury as follows:

"That if the jury believe the defendant held the above conversations as stated by the witnesses, such conversations amount to *a waiver of the objection* of the want of demand and notice; and the *defendant is liable on the note*, if the jury should

believe that the defendant made the acknowledgements and declarations stated in the conversations *in reference to the claim of the bank upon him as indorser* of the note; which the court refused.

"And the plaintiffs then prayed the court to instruct the jury as follows:

"That if the jury believe, from the evidence aforesaid, that the defendant, after knowing of his discharge from liability as indorser of the said note, by the neglect to demand and give notice, said, "that he meant to pay the note, but should take his own time for it, and would not put himself in the power of the bank," and that the bank forbore bringing suit, from the time of said conversation, about three or four months after the note fell due, until the date of the writ issued in this cause, then the plaintiffs are entitled to recover on the second count of the declaration, which also the court refused to give; to which refusal to give the said instructions, the plaintiffs excepted."

The question s, whether these instructions thus propounded were rightly refused by the court. And we are of opinion that they were. The first requests the court to instruct the jury upon a mere matter of fact, deducible from the evidence; and which it was the proper province of the jury to decide. It asks the court to declare that the conversations stated (sufficiently loose and indeterminate in themselves), amounted to a waiver of the objection of the want of demand and notice. Whether these did amount to such a waiver, was not matter of law, but of fact; and the sufficiency of the proof for this purpose was for the consideration of the jury.

The second instruction is open to the same objection. It calls upon the court to decide upon the sufficiency of the proof, to establish that there was a forbearance by the plaintiffs to sue the defendant upon the note, and of the promise of the defendant, in consideration of the forbearance, to pay the same. That was the very matter upon which the jury were to respond, as matter of fact. It is also open to the additional objection, that it asks the court to decide this point, not upon the whole evidence, but upon a single sentence of the conversations stated, without the slightest reference to the manner in which

the meaning and effect of that sentence was, or might be, controlled by the other points of the conversations, or the attendant circumstances. In either view it was properly refused.

The court have also been called upon to review their former decision in this case. (3 Peters's Rep. 87.) To this it might be a sufficient answer to say, that no case is made out upon the record, calling for such a review; and if it were, we are entirely satisfied with that decision.

The judgment of the circuit court is therefore affirmed, with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed with costs.

JOSEPH SHAW, PLAINTIFF IN ERROR v. JOSEPH COOPER.

ction for an alleged violation of a patent for an improvement in guns and fire arms.

he letters patent were obtained in 1822; and in 1829, the patentee having surrendered the same for an alleged defect in the specification, obtained another patent. This second patent is to be considered as having relation to the emanation of the patent of 1822; and not as having been issued on an original application.

The holder of a defective patent may surrender it to the department of state, and obtain a new one, which shall have relation to the emanation of the first.

The case of Grant and others v. Raymond, 6 Peters, 220, cited and affirmed.

A second patent granted on the surrender of a prior one being a continuation of the first, the rights of a patentee must be ascertained by the law under which the original application was made.

By the provisions of the act of congress of 17th April 1800, citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases, the right must be tested by the same rule.

What use by the public, before the application is made for a patent, shall make void the right of a patentee.

From an examination of the various provisions of the acts of congress relative to patents for useful inventions, it clearly appears that it was the intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only; and that, on condition that his invention was neither known nor used by the public, before his application for a patent. If such use or knowledge shall be proved to have existed prior to the application for the patent, the act of 1793 declares the patent void; and the right of an alien is vacated in the same manner, by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien.

The knowledge or use spoken of in the act of congress of 1793, could have referred to the public only; for the provision would be nugatory if it were applied to the inventor himself. He must necessarily have a perfect knowledge of the thing invented, and of its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent.

There may be cases in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances, no presumption can arise in favour of an abandonment of the right to the public by the inventor: though an acquiescence on his part will lay the foundation for

such a presumption. It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery, for the period contemplated by law. But those can only be reserved by a substantial compliance with every legal requisite. This exclusive right does not rest alone on his discovery, but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed.

No matter by what means an invention may have been communicated to the public before a patent is obtained, any acquiescence in the public use by the inventor will be an abandonment of the right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent.

The acquiescence of an inventor in the public use of his invention, can in no case be presumed where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will in general be a fact for a jury: and if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as forever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public.

A strict construction of the act of congress, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy.

The question of abandonment to the public, does not depend on the intention of the inventor. Whatever may be the intention, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right.

IN error to the circuit court of the United States for the southern district of New York.

At the October term 1829 of the circuit court for the southern district of New York, the plaintiff in error, Joseph Shaw, instituted an action against the defendant, Joseph Cooper, for an alleged violation of a patent granted to him by the United States, dated the 7th of May 1829, for "a new and useful improvement in guns and fire arms, which improvement consisted in a priming head and case applied to arms and fire arms, for the purpose of priming and giving them fire by the means or use of percussion, fulminating or detonating powder;" by which patent the plaintiff alleged that there was granted to him, &c. for the term of fourteen years from the 19th of June

1822, the exclusive right to the said invention, and by virtue of which he became entitled to the same for the residue of the term unexpired on the 7th day of May 1829. The declaration averred that the defendant had violated the patent right of the plaintiff, on the 1st day of August 1829; and afterwards between that day and the institution of the suit.

The defendant pleaded not guilty, and gave the following notice of the matters of defence.

"Please to take notice, that on the trial of the above cause, the above named Joseph Cooper will, under the plea of the general issue aforesaid, insist upon, and give in evidence, that the pretended new and useful improvement in guns and fire arms, mentioned and referred to in the several counts of the said Joshua Shaw's declaration, was not originally discovered or invented by the said Joshua Shaw; also, that the said pretended new and useful improvement, or the material or essential parts or portions thereof, or some or one of them, had been known and used in this country, viz. in the city of New York, and in the city of Philadelphia, and in sundry other places in the United States, and in England, and in France, and in other foreign countries, before the said Joshua Shaw's application for a patent, as set forth in his said declaration; and also, before the alleged invention or supposed discovery thereof by the said Joshua Shaw.

"And further, that the said alleged new and useful improvement, or the material or essential parts or portions thereof, or some or one of them, or the principle thereof, was the invention or discovery of a gun maker, or of some other person, residing in England. And further, that the said patent was void, because in and by the specification or description therein referred to, no distinction or discrimination is made between the parts and portions previously known and used as aforesaid, and any parts or portions of which the said Joshua Shaw may be the inventor or discoverer: the said Joseph Cooper at the same time protesting that he, the said Joshua Shaw, has not been the inventor or discoverer of any part or portion of the said alleged improvement.

"And further, that the said patent is void, because the said specification or description does not describe the improvement

of which the said Joshua Shaw claims to be the inventor or discoverer, in such full, clear, and exact terms, as to distinguish the same from all other things before known, nor so as to enable a person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make and use the same. And further, that the said patent is void, because it was not granted, issued or obtained, according to law. And further, that the said patent is void, because it was surreptitiously obtained by the said Joshua Shaw."

The cause was tried in January 1832, and a verdict and judgment given for the defendant. The plaintiff prosecuted this writ of error.

The following bill of exceptions was tendered by the counsel for the plaintiff, and sealed by the court.

"The plaintiff, to maintain the issue on his grant, gave in evidence the letters patent of the United States of America, as set forth in the declaration of the said plaintiff, issued on the 7th day of May 1829; and also that the improvement for which the said letters patent were granted, was invented or discovered by the said plaintiff in the year 1813 or 1814, and that the defendant had sold instruments which were infringements of the said letters patent. And thereupon the said defendant, to maintain the said issue above joined on his part, then and there proved by the testimony of one witness, that he had used the said improvement in England, and had purchased a gun of the kind there, and had seen others use the said improvement, and had seen guns of the kind in the duke of York's armoury in 1819: and also proved by the testimony of five other witnesses, that, in 1820 and 1821, they worked in England at the business of making and repairing guns, and that the said improvement was generally used in England in those years, but that they never had seen guns of the kind prior to those years: and also proved that, in 1821, it was known and used in France, and also that the said improvement was generally known and used in the United States of America after the 19th day of June 1822. Whereupon the said plaintiff, further to maintain the said issue on his part, then and there gave in evidence, that the said plaintiff, not being a worker in iron in 1813 or 1814, employed his brother,

in England, under strict injunctions of secrecy, to execute or fabricate the said improvement for the purpose of the said plaintiff's making experiments. And that the said plaintiff, afterwards, in 1817, left England, and came to reside in the United States of America; and that, after the departure of the said plaintiff from England, viz. in 1817 or 1818, his said brother divulged the said secret for a certain reward to an eminent gun maker in London: that the said plaintiff, on his arrival in this country, in 1817, disclosed his said improvement to a gun maker, whom he consulted as to obtaining a patent for the same, and whom he wished to engage to join and assist him. That the plaintiff made said disclosures under injunctions of secrecy, claiming the improvement as his own, and declaring that he should patent it. That the said plaintiff treated his invention as a secret after his arrival in this country, often declaring that he should patent it; and that he assigned as a reason for delaying to patent it, that it was not so perfect as he wished to make it before he introduced it into public use: and that he did make alterations in his invention up to about the date of his patent, which some witnesses considered as improvements, and others did not. That, in this country, the said invention was never known nor used prior to the said 19th day of June 1822: that, on that day, letters patent were issued to the said plaintiff, being then an alien, for his said invention; and that the said plaintiff immediately brought the said invention into public use under the said letters patent. That afterwards, and after suits had been brought for violation of the said letters patent, the said plaintiff was advised to surrender them on account of the specification being defective, and that he did accordingly, on the 7th day of May 1829, surrender the same into the department of the secretary of state of the United States of America; and that, thereupon, the letters patent first above mentioned were issued to the said plaintiff. And the said plaintiff also gave in evidence that, prior to the said 19th day of June 1822, the principal importers of guns from England, in New York and Philadelphia, at the latter of which cities the plaintiff resided, had never heard any thing of the said invention, or that the same was known or used in England; and that no guns of the kind were imported

into this country until in the years 1824 or 1825. And that letters patent were granted in England on the 11th day of April 1807, to one Alexander J. Forsyth, for a method of discharging or giving fire to artillery, and all other fire arms; which method he describes in his specification as consisting in 'the use or application as a priming, in any mode, of some or one of those chemical compounds which are so easily inflammable as to be capable of taking fire and exploding without any actual fire being applied thereto, and merely by a blow, or by any sudden or strong pressure or friction given or applied thereto, without extraordinary violence; that is to say, some one of the compounds of combustible matter, such as sulphur or sulphur and charcoal, with an oxmuriatic salt; for example, the salt formed of dephlogisticated marine acid and potash (or potasse), which salt is otherwise called oxmuriate of potash; or such of the fulminating metallic compounds as may be used with safety; for example, fulminating mercury, or of common gunpowder, mixed in due quantity with any of the above mentioned substances, or with any oxmuriatic salt as aforesaid, or of suitable mixtures of any of the before mentioned compounds;' and that the said letters patent continued in force for the period of fourteen years from and after granting of the same. (It is understood that the patent and specification of Forsyth, may be at any time referred to on the argument for correction or explanation of the bill of exceptions.) And thereupon the defendant, further to maintain the said issue on his part, gave in evidence a certain letter from the plaintiff to the defendant, dated in December 1824, from which the following is an extract: 'some time since I stated that I had employed counsel respecting regular prosecutions for any trespasses against my rights to the patent: I have at length obtained the opinions of Mr Sergeant of this city, together with others eminent in law, and that is, that I ought (with a view to insure success) to visit England, and procure the affidavits of Manton and others to whom I made my invention known, and also of the person whom I employed to make the lock at the time of invention; for it appears very essential that I should also prove that I did actually reduce the principle to practice, otherwise a verdict might be doubtful. It is therefore my intention to visit

England in May next for this purpose; in the mean time, proceedings which have commenced here are suspended for the necessary time.'

"And the said judges of the said court did thereupon charge and direct the said jury, that the patent of the 7th day of May 1829, having been issued, as appeared by its recital on the surrender and concealment of the patent of the 19th day of June 1822, and being intended to correct a mistake or remedy a defect in the latter, it must be considered as a continuation of the said patent, and the rights of the plaintiff were to be determined by the state of things which existed in 1822, when the patent was obtained.

"That the plaintiff's case therefore came under the act passed the 17th day of April 1800, extending the right of obtaining patents to aliens, by the first section of which, the applicant is required to make oath that his invention has not, to the best of his knowledge or belief, been known or used in this or any foreign country. That the plaintiff most probably did not know, in 1822, that the invention for which he was taking out a patent, had, before that time, been in use in a foreign country; but that his knowledge or ignorance on that subject was rendered immaterial by the concluding part of the section, which expressly declares, that every patent obtained pursuant to that act, for any invention which it should afterwards appear had been known or used previous to such application for a patent, should be utterly void. That there was nothing in the act confining such use to the United States; and that, if the invention was previously known in England or France, it was sufficient to avoid the patent under that act. That the evidence would lead to the conclusion that the plaintiff was the inventor in this case; but the court were of opinion that he had slept too long on his rights, and not followed them up as the law requires, to entitle him to any benefit from his patent. That the use of the invention, by a person who had pirated it, or by others who knew of the piracy, would not affect the inventor's rights, but that the law was made for the benefit of the public as well as of the inventor: and if, as appeared from the evidence in this case, the public had fairly become possessed of the invention before plaintiff applied for his patent, it was

sufficient, in the opinion of the court, to invalidate his patent. even though the invention may have originally got into public use through the fraud or misconduct of his brother, to whom he entrusted the knowledge of it."

The case was submitted to the court, on printed arguments, by Mr Paine, for the plaintiff in error; and Mr Emmet, for the defendant.

For the plaintiff in error it was contended, that the case fell within the principles which had been uniformly acknowledged and supported in the circuit court of the United States; and which were not intended to be disavowed, but sanctioned by this court in Pennock v. Dialogue, 2 Peters, 1.

In this country many strong cases of public use, prior to the application for a patent, have been brought before the courts, where the public had been long in possession; and the courts have allowed the inventor to show in different ways, that he had not thereby abandoned his use to the public. How much more favourable to us are the circumstances of our case, as respects a prior use. Before we took out our first patent, the invention had never been seen nor heard of in this country. It was not then known to ourselves, nor to any others in this country, that it had been used in England; and it had been so used only one or two years—a short period, compared with the many cases which have been sustained by the courts. Even if this use had been an American use, it would not have been an extraordinary one. But it was not an American, but a foreign use; and, therefore, not a use by the public, who contest our exclusive right, by saying that they had become the innocent possessors of our invention. Not one of that public had gotten possession of it.

The case does not seem to be fairly stated, when it is said that, although the invention was disclosed by piracy, yet the public have innocently got possession of it by that means. The only public who can set up the innocence of their possession as against us, did not get their possession by the piracy; but under the invalid patent. And if this be so, what difference does it make that afterwards guns were brought from England?

Does such a circumstance bear, can it be made to bear at all upon the merits of the case?

The parts of the charge to the jury of the circuit court which are objected to, as understood by the counsel for the plaintiff, may be stated thus:

That the use of the invention abroad, acquired through a fraudulent or piratical disclosure of the secret, for a period of only one or two years before the application for the patent, and that use entirely unknown to the inventor here, avoids the patent, because it was obtained under the alien act.

That our patent of 1829, obtained under the citizen's act, is, in respect to the prior foreign use, to be construed as if obtained under the alien act, because it was obtained on the surrender of the patent of 1822, which was obtained under the alien act, the one being only a continuation of the other.

That the inventor (the court are understood to have been speaking, in this part of the charge, without reference to the question as to whether the patent was obtained under the alien or citizen's act, but to have designed their remarks to apply to patents generally,) had slept too long on his rights, and not followed them up as the law requires, to entitle him to any benefit from his patent; that the use of the invention, by a person who had pirated it, or by others who knew of the piracy, would not affect the inventor's right; but that the law was made for the benefit of the public, as well as of the inventor; and if, as appeared from the evidence in this case, the public had fairly become possessed of the invention before the plaintiff applied for his patent, it was sufficient to invalidate his patent, even though the invention may have originally got into public use through the fraud or misconduct of his brother, to whom he intrusted the knowledge of it.

The following points comprehend these objections to the charge of the court.

1. The second patent is original and independent, and not a continuation of the first patent.

When patents are surrendered and cancelled in England, they are entirely vacated and gone, and as if they had never existed; and the king can grant out the right, de novo, either to the same, or to any other person. 17 Vin. Abridg. 114,

Prerogative of the King, R. b. paragraph 9; 17 Vin. Abridg. 151, Prerogative, &c. M. C. paragraph 2, 3, 4, 6, 10, 14. Godson on Pat. 200; Com. Dig. 'Patent,' G.

If this is the effect of a surrender there, it must be the same here.

Not a dictum can be found in the English books, that a second patent is a continuation of the first. No such idea can be found in our own books, although cases of surrender have come before our courts.

The right of an inventor to surrender an invalid patent, and take out a new one, being admitted, it follows, that if, between the two patents, he has been naturalized, he must, of necessity, take out a patent under the citizen's act; because he is no longer an alien. If he, rightfully, takes a patent under the citizen's act, he is entitled to all the advantages that act confers; and among them, to have his patent construed and adjudicated upon, under the provisions of that act and of no other.

2. A fraudulent or piratical use of the invention, either at home or abroad, before the application for a patent, cannot have any other or greater effect to invalidate a patent obtained under the alien act, than one obtained under the citizen's act.

On general principles it cannot; for, as to all kinds of property, no one can acquire a right to it except by the consent of the owner. Theft or fraud can never enable one who gets possession by those means to transfer the property. See authorities cited under next point.

It is on this principle that the courts first began to construe the citizen's act, by arraying the sixth section against the first. They said the legislature meant to provide by the sixth section for the exception of cases of fraud, &c., out of the too rigid and literal operation of the first section. Afterwards, the courts took a more liberal view of the act, and held that, even without the sixth section, the legislative intention to except such cases from the first section would be presumed: and this is the doctrine finally settled in Pennock v. Dialogue.

The construction given by this court in the case of Pennock v. Dialogue, 2 Peters, 22, is entirely in favour of the plaintiff in error.

The court there say, in that case, "the act of 17th April

1800, ch. 25, which extends the privileges of the act of 1793 to inventors who are aliens, contains a proviso, declaring that 'every patent which shall be obtained pursuant to the act, for any invention, art or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be void.' This proviso certainly certifies the construction of the act of 1793, already asserted; for there is not any reason to suppose that the legislature intended to confer on aliens privileges essentially different from those belonging to citizens: on the contrary, the enacting clause of the act of 1800 purports to put both on the same footing, and the proviso seems added as a gloss, or explanation of the original act."

Now the proviso is the only thing in the alien act which can make it at all different in this particular from the citizen's act; and the courts say that it does not make any difference, but merely expresses more fully what was the meaning of the citizen's act.

3. If an invention has been pirated or fraudulently divulged, the inventor cannot thereby lose his right to his own invention and property; and it makes no difference that the public have acquired the use of the invention without any participation in the fraud, unless the inventor has acquiesced in such use; the only principle to be found in the American decisions on this subject being, that a public use does not affect the inventor's right, unless it proves that he has dedicated or abandoned his invention to the public. And in this case there is no evidence of such delay or neglect as would amount to an abandonment, nor of any intention to dedicate the invention to the public.

It is a general principle as to all kinds of personal property, that even a bona fide purchaser for a valuable consideration can never acquire property of which another has been deprived by fraud, theft or violence, or even by a bailment. 1 Wils. Rep. 8; 2 Str. Rep. 1187; 3 Atk. Rep. 44; Salk. Rep. 283.

In this respect, no difference has ever yet been made between a man's property in his inventions, and his other property; and there seems to be no reason or principle making a distinction.

The statute of Massachusetts securing copyrights (before the federal union) begins with a preamble declaring that "no

property is more peculiarly a man's own, than that which is produced by the labour of his mind." Cited, 1 Dane's Abridg. 527.

In Miller v. Taylor, 4 Burr. 2303, seven judges against four held that at common law the author of a literary composition did not lose his right by publishing it.

So far, then, as the natural rights of men to this species of property, (copyright) independently of statutory provisions, are in question, they retain all their rights to such property, notwithstanding the public have innocently got possession of it, and even with the author's consent; and there surely can be no difference, when we go back to natural rights at common law, whether the property is the subject of a copyright or of a patent; whether it be a book or a machine: the public, having got the use or possession, must have as much right to make copies of the book as of the machine; both are the produce of the mind. This view is taken merely to show that this species of property has been treated as subject to the same rules of law as other kinds of property, i. e. except so far as the statute makes a difference. Now it is admitted, that under the statute, neither the pirate, nor any one participating in his piracy, can acquire any rights against the inventor. And why? Because the same rules of justice which apply to all other kinds of property, are applied by the courts to this, as being the intention of the statute, although against its letter. But why stop at the pirate, and say that you will not extend the rule to the public, when they have innocently got the possession? Do you stop thus as to other kinds of property? No. You say, no one, however innocent of the fraud, can become the lawful proprietor. Why, then, not carry the principle to its full extent? How can it be inferred that the statute intends to go a part of the way of a general principle, and there stop? The principle is a rule drawn by analogy from other kinds of property, on the ground that, the analogy being general, the rule should be so too. But the analogy is also complete between this and other kinds of property, and the rule ought therefore to be complete, and applied in its full extent.

But there is even a stronger reason why this principle of law should be applied to this species of property in its full extent,

rather than to the case of a bona fide purchaser of any other kind. There he has paid a consideration, an equivalent. It is a hard case; one of two innocent persons must suffer. Not so here. What does the public lose? That which has cost it nothing; for which it has given no equivalent: and all we seek of them is the consideration, the equivalent, which they have never yet paid to any one.

But if we examine the American cases on this subject prior to Pennock v. Dialogue, we shall find that the principle has always been applied to inventions, in its full extent.

The counsel then proceeded to examine the following cases, and argued that they fully sustained the principles claimed for the plaintiff in error. Whettemore v. Cutter, 1 Gall. 482; Goodyear v. Mathews, 1 Paine's Rep. 301; Morris v. Huntington, 1 Paine, 354; Mellers v. Silsbee, 4 Mason's Rep. 108; Treadwell v. Bladen, 4 Wash. C. C. R. 703.

The bill of exceptions says, "that the plaintiff assigned as a reason for delaying to patent it (the invention), that it was not so perfect as he wished to make it before he introduced it to public use; and that he did make alterations in his invention up to about the date of his patent, which some witnesses considered as improvements, and others did not."

This was sufficient to account for the delay; and it is unimportant whether the alterations were improvements or not; for he was trying to make them, and said that was his motive for the delay; and the *motive* for the delay is the only question. 1 Paine's Rep. 354.

The patent granted to Forsyth, in England, which gave him the exclusive right to use the percussion powders in any mode down to April 1821, accounts for our not taking out a patent in England.

Finally, the counsel for the plaintiff in error contended:

1. That if the rights of the patentee were the same as under an ordinary citizen patent, then he had never dedicated or abandoned his invention to the public; and that there has been no use of it which invalidates his patent.

2. That his rights are the same as those under an ordinary citizen's patent; the patent having been granted under the citizen's act, and not being affected by the previous vacated patent.

3. That even if he is to be considered as having a patent under the alien act, his rights, under the circumstances of this case, are the same as if it was a citizen's patent.

In conclusion, he remarked, that the jury found their verdict entirely under the charge of the court, considering that the charge, as to the points of law, precluded them from finding a verdict for the plaintiff; however well they might be satisfied upon every matter of fact. It was believed the jury, as well as the court, were entirely satisfied that the plaintiff was the inventor, and that his invention had been used without his knowledge or suspicion; and that he had never disclosed it, except in confidence, and under the strictest injunctions of secrecy.

The letter from plaintiff to defendant should not have been put in the bill of exceptions, because it only presented questions of fact purely, not affecting any of the points of law on which the court charged the jury. This court will not regard a mere isolated fact, when it is apparent that all the facts of the case are not given, but only such as are essential to show how the jury were charged as to the law. It is impossible for this court to say how the jury would have found upon the whole evidence. It is sufficient to add, that the meaning of that letter was satisfactorily explained to the jury by the plaintiff's counsel. It was explained, that the knowledge of his invention, which the plaintiff in that letter says he communicated to "Manton and others," was simply the knowledge of the fact, that he had made *an* important invention, *without disclosing what it was*. On any other supposition, this letter was contradicted by all the rest of the evidence in the case, and the uniform conduct of the plaintiff.

Mr Emmet, for the defendant in error.

The bill of exceptions in this cause, discloses in substance the following case:

In 1813 or 1814, the plaintiff, residing in England, invented what he claims to be secured to him by his patent. Between that time and his coming to the United States, he made his invention known to his brother, also to Mr Manton, a gun-maker in London, and others—as is shown by his letter to defendant.

In 1817, the plaintiff came to the United States, and shortly afterwards disclosed his secret to a gunmaker in Philadelphia.

In 1817 or 1818, plaintiff's brother sold the secret to a gunmaker in London.

In 1819, the invention was sold and used in England.

In 1820 or 1821, it was in general use by the public there.

In 1821, it was in general use in France.

In 1822, (19th June), plaintiff took out his first patent as an alien, under the act of 1800.

In 1829, (7th May), he surrendered that patent as defective, and took out a new one with an amended specification, as a citizen, under the act of 1793, upon which patent his suit is brought.

The case also sets forth, that in April 1807, a patent had been granted in England to one Forsyth, for an invention on the same subject, and that such patent continued in force for fourteen years, or until April 1831. This was offered by the plaintiff, and made a part of the case, for the purpose, doubtless, of accounting for his not having taken out a patent for his invention in England previous to 1817, the terms of Forsyth's patent being, as he supposed, sufficiently comprehensive to embrace his discovery, and to tie up his hands during its continuance.

From these facts, it would at least appear that the public had *somewhere* become fully possessed of the use of the invention, and that they had enjoyed such use for not less than about two years before the plaintiff took any teps to obtain his first patent.

Without stopping now to inquire what should be considered as *the public* in respect to a case of this kind, let us examine how far the acts of the plaintiff himself have precluded him from ever controverting the right of that public to the use of the thing in question.

The principle upon which *previous public use* of an invention invalidates a patent, undoubtedly is, that the inventor can no longer give any *consideration* or *equivalent* for the exclusive privilege claimed by him; and the law, to sustain a principle so necessary and just in itself, presumes an *abandonment* by the inventor. This abandonment may be either *actual*, as by

voluntary dedication, or *constructive*, as by *negligence* or *unreasonable delay*. Paine's Rep. 300.

In the present case, can it be pretended that there was neither *negligence*, nor *unreasonable delay?* The plaintiff would have it appear, that up to 1822 he was *maturing* his invention, and yet what he then took out a patent for, was the *very thing*, and no improvement upon that, which for two or three years previous had been generally known and used in England and France. But admitting this explanation to stand for what it is worth, how does it tally with his other ground of excuse. He says Forsyth's patent restrained him in England. Be it so—and what is the fair inference? Why, that if it had not been for Forsyth's patent, *he* would have applied there for one before 1817; and if he would, his invention *was matured* before he came to the United States; and nothing but his alienism stood in the way of his applying for a patent immediately after his arrival. Being an alien, the law required him to delay two years. In 1819, therefore, he might and ought to have taken out his patent; and if he had done so, he would have anticipated the *public use* of the invention in England and France. But he delayed until 1822, a period of three years. His own story shows that such delay was without sufficient cause. It was, therefore, *unreasonable;* and the law in protection of the right acquired in the mean time by the public, construes his acts into an *abandonment*.

It would appear that, even to the mind of the plaintiff's counsel, this view of the case is conclusive, unless the fact of the invention having got into *public use* before the first patent was taken out, can be shaken; for they say, that the use, in this case, was not an *American*, but a foreign use, and therefore not a use by the public, who contest their exclusive right. This distinction is directly opposed to the act of 1800, which uses the language "known or used, in this or *any foreign country*:" and it is equally opposed to the intent and meaning of the act of 1793. We are perfectly willing to admit that in this respect, the construction of both acts should be the same; and that the proviso at the end of the first section of the act of 1800 applies to *every patent*, whether obtained under *that* act or the act of 1793. In the words of Mr Justice Story, the act of

1800 affords, in this respect, a gloss or explanation of the original act. Pennock v. Dialogue, 2 Peters's S. C. Rep. 22. This only tends to show, that if the plaintiff had been a citizen in 1822, and had taken out his first patent under the act of 1793, his case would have been just as objectionable as it is now. But where do the plaintiff's counsel find any law for such a distinction between American and foreign *public use*, or how could it be sustained on principle? If the doctrine be a sound one, it would go to this extent—I dedicate my invention to the public in Europe; the European public being thus legally possessed of it, the article is manufactured and exported in large quantities; I immediately come over here, take out a patent, and prevent the use of the article in the United States, thereby prohibiting the European public from engaging in a traffic or commerce which was an immediate incident to my own grant or dedication to them.

The impolicy of recognizing such a distinction, would afford a sufficient argument against it, even if the terms of the statute were not explicit; and if nothing had ever fallen from the bench to give a construction to the expression "public use." But there is positive and high authority on this subject. Lord Chief Justice Gibbs says, "to entitle a man to a patent, the invention must be *new to the world*." 1 Holt N. P. Rep. 58. And such, we submit, is the settled law on this point.

It would seem to be of little importance in this cause to discuss the plaintiff's position "that the second patent is original and independent, and not a continuation of the first patent;" because the only object of disconnecting the two patents in this case, would be to rescue the second patent from the operation of the act of 1800, under which the first patent was taken, (the judge having charged the jury that the act of 1800 was sufficient to control the case). Now, we not only admit that the act of 1793 should receive a similar construction with that of 1800, as to *previous knowledge or use* of an invention, but the plaintiff's counsel labour to establish this very ground. Their position, however, is not a correct one. The object of canceling a first patent, and taking out a second, is not to take a fresh start for the term of years during which the law allows the exclusive right to be conferred. It is to enable the inventor

to enjoy, for the *remainder of that term*, the privilege which was *originally intended* to be granted. And in this view, even if the construction of the two acts was different, we apprehend that the judge laid down the law correctly, viz. that the plaintiff's rights depended upon the state of things in 1822, and upon the act of 1800.

It is only necessary to follow the plaintiff's argument on his third point, to perceive the impediment which the first section of the act of 1800, taken either in reference to that act only, or as explanatory of the act of 1793, offers to his case. To get rid of this difficulty, it is in substance contended by his counsel, that the legislature did not mean what they have said in this section, when certain cases came to be considered; and that the positive and unequivocal language used by them is, in this respect, unimportant. Now, the very fact that this section was intended to be *declaratory* of the law in all cases, whether arising under that, or the former act of 1793, shows that the explicit language used, was considered to be all-important by the legislature; and it certainly was not contemplated that this explicit language should be frittered away to suit particular cases.

If the facts of this case, as we have endeavoured to show, make out *negligence* or *unreasonable delay* on the part of the plaintiff in taking out his patent· and that such negligence or unreasonable delay amounts *in law* to an *abandonment;* the case is disposed of. We contend also that the delay was not accounted for; the alleged reason for it being virtually contradicted by the testimony offered to make out his case; and further, that the finding of the jury is conclusive as to this point.

The intent of the delay of the patent, and whether the allowing the invention to be used without a patent, should not be considered an abandonment, or a present of it to the public, are questions for the jury. Morris v. Huntington, Paine's Rep. 22.

The principles which we contend for, being recognized in many of the cases cited on the part of the plaintiff, (particularly the case of Pennock v. Dialogue), it has been deemed unnecessary to refer to those cases more particularly. If the

charge of the judge was not erroneous as to the law, there can be no ground for granting a new trial.

Mr Justice M'Lean delivered the opinion of the Court.

This writ of error brings before this court, for its revision, a judgment of the circuit court of the United States for the southern district of New York.

An action was brought in the circuit court by Shaw against the defendant Cooper, for the violation of a certain patent right, claimed by the plaintiff. The defendant pleaded the general issue, and gave notice that on the trial he would prove "that the pretended new and useful improvement in guns and fire arms, mentioned and referred to in the several counts in the declaration; also that the said pretended new and useful improvement, or the essential parts or portions thereof, or some or one of them, had been known and used in this country, viz. in the city of New York and in the city of Philadelphia, and in sundry other places in the United States, and in England, in France, and in other foreign countries, before the plaintiff's application for a patent as set forth in his declaration," &c.

On the trial, the following bill of exceptions was taken: "to maintain the issue joined, the plaintiff gave in evidence certain letters patent of the United States, as set forth in the declaration, issued on the 7th day of May 1829; and also that the improvement for which the letters were granted, was invented or discovered by the plaintiff in 1813 or 1814; and that the defendant had sold instruments which were infringements of the said letters patent.

"And the defendant then proved, by the testimony of one witness, that he had used the said improvement in England, and had purchased a gun of the kind there, and had seen others use the said improvement, and had seen guns of the kind in the duke of York's armoury in 1819. And also proved by the testimony of five other witnesses, that, in 1820 and 1821, they worked in England at the business of making and repairing guns, and that the said improvement was generally used in England in those years; but that they had never seen guns

of the kind prior to those years: and also proved that in the year 1821, it was used and known in France; and also that the said improvement was generally known and used in the United States after the 19th day of June 1822.

"And the plaintiff, further to maintain the issue on his part, then gave in evidence, that he not being a worker in iron in 1813 or 1814, employed his brother in England, under strict injunctions of secrecy, to execute or fabricate the said improvement for the purpose of making experiments. And that the plaintiff afterwards, in 1817, left England and came to reside in the United States; and that after his departure from England, in 1817 or 1818, his said brother divulged the secret for a certain reward to an eminent gun maker in London. That on the arrival of the plaintiff in this country, in 1817, he disclosed his said improvement to a gun maker, whom he consulted as to obtaining a patent for the same, and whom he wished to engage to join and assist him. That the plaintiff made this disclosure under injunctions of secrecy, claiming the improvement as his own, declaring that he should patent it. That the plaintiff treated his invention as a secret after his arrival in this country, often declaring that he should patent it; and that this step was only delayed, that he might make it more perfect before it was introduced into public use: and that he did make alterations which some witnesses considered improvements in his invention, and others did not. That in this country the invention was never known nor used prior to the said 19th day of June 1822; that on that day letters patent were issued to the plaintiff, being then an alien, and that he immediately brought his invention into public use. That afterwards, and after suits had been brought for a violation of the said letters patent, the plaintiff was advised to surrender them on account of the specification being defective; and that he did accordingly, on the 7th day of May in the year 1829, surrender the same into the department of the secretary of state, and received the letters patent first above named.

"And the plaintiff also gave in evidence, that prior to the 19th day of June 1822, the principal importers of guns from England in New York and Philadelphia, at the latter of which cities the plaintiff resided, had never heard any thing of the

said invention, or that the same was used or known in England; and that no guns of the kind were imported into this country, until in the years 1824 or 1825. And that letters patent were granted in England on the 11th day of April 1807, to one Alexander J. Forsyth, for a method of discharging or giving fire to artillery and all other fire arms; which method he describes in his specification as consisting in the 'use or application as a priming, in any mode, of some or one of those chemical compounds which are so easily inflammable as to be capable of taking fire and exploding without any actual fire being applied thereto, and merely by a blow, or by any sudden or strong pressure or friction given or applied thereto, without extraordinary violence; that is to say, some one of the compounds of combustible matter, such as sulphur or sulphur and charcoal, with an oxmuriatic salt; for example, the salt formed of dephlogisticated marine acid and potash (or potasse), which salt is otherwise called oxmuriate of potash; or such of the fulminating metallic compounds as may be used with safety; for example, fulminating mercury, or of common gunpowder mixed in due quantity with any of the above mentioned substances, or with any oxmuriatic salt, as aforesaid, or of suitable mixtures of any of the before mentioned compounds;' and that the said letters patent continued in force for the period of fourteen years from the time of granting the same."

And the defendant, further to maintain the issue on his part, gave in evidence a certain letter from the plaintiff to the defendant, dated in December in the year 1824, from which the following is an extract: "some time since I stated that I had employed counsel respecting regular prosecutions for any trespass against my rights to the patent; I have at length obtained the opinion of Mr Sergeant of this city, together with others eminent in the law, and that is, that I ought (with a view to insure success) to visit England, and procure the affidavits of Manton and others, to whom I made my invention known, and also of the person whom I employed to make the lock at the time of invention; for it appears very essential that I should prove that I did actually reduce the principle to practice, otherwise a verdict might be doubtful. It is, therefore, my intention to visit England in May next for this purpose; in the mean time

proceedings which have commenced here are suspended for the necessary time."

And the court, on these facts, charged the jury that the patent of the 7th of May 1829, having been issued, as appears by its recital, on the surrender and cancelment of the patent of the 19th day of June in the year 1822; and being intended to correct a mistake or remedy a defect in the latter; it must be considered as a continuation of the said patent, and the rights of the plaintiff were to be determined by the state of things which existed in the year 1822, when the patent was first obtained.

That the plaintiff's case, therefore, came under the act passed the 17th day of April 1800, extending the right of obtaining patents to aliens; by the first section of which the applicant is required to make oath, that his invention has not, to the best of his knowledge or belief, been known or used in this or any foreign country. That the plaintiff most probably did not know, in the year 1822, that the invention for which he was taking out a patent, had, before that time, been in use in a foreign country; but that his knowledge or ignorance on that subject was rendered immaterial by the concluding part of the section, which expressly declares, that every patent obtained pursuant to that act, for any invention which it should afterward appear had been known or used previous to such application for a patent, should be utterly void. That there was nothing in the act confining such use to the United States; and that, if the invention was previously known in England or France, it was sufficient to avoid the patent under that act. That the evidence would lead to the conclusion that the plaintiff was the inventor in this case, but the court were of opinion that he had slept too long on his rights, and not followed them up as the law requires, to entitle him to any benefit from his patent. That the use of the invention, by a person who had pirated it, or by others who knew of the piracy, would not affect the inventor's rights, but that the law was made for the benefit of the public as well as of the inventor; and if, as appears from the evidence in this case, the public had fairly become possessed of the invention before the plaintiff applied for his patent, it was sufficient, in the opinion of the court, to invalidate the

patent; even though the invention may have originally got into public use through the fraud or misconduct of his brother, to whom he entrusted the knowledge of it.

Under this charge the jury found a verdict for the defendant, on which a judgment was entered.

There is a general assignment of errors, which brings to the consideration of the court the principles of law which arise out of the facts of the case, as stated in the bill of exceptions.

It may be proper, in the first place, to inquire whether the letters patent which were obtained in 1829, on a surrender of the first patent, have relation to the emanation of the patent in 1822, or shall be considered as having been issued on an original application.

On the part of the plaintiff it is contended, that "the second patent is original and independent, and not a continuation of the first patent." That in adopting the policy of giving, for a term of years, exclusive rights to inventors in this country, we adopted at the same time the rules of the common law as applied to patents in England: and that by the common law, a patent when defective may be surrendered to the granting power, which vacates the right under it, and the king may grant the right de novo either to the same or to any other person.

This being the effect of the surrender of a patent in England, it is insisted, that the same consequence should follow a surrender in this country. On this subject it is said, that the decisions of the English courts are uniform, and that not even a dictum can be found, that a second patent is a continuation of the first.

The counsel seems to consider this point of great importance, as the plaintiff was an alien when the first patent was obtained, but had become naturalized before the date of the second; and, consequently, that his rights under the second patent, cannot be governed by the law applicable to aliens. As the inquiry on this head is, whether the second patent has relation to the first, it is not necessary to look into the laws to ascertain the respective rights of aliens and citizens on this subject. In regard to the right of the patentee to surrender a defective patent, and take out a new one; there can be no difference between a citizen and an alien.

That the holder of a defective patent may surrender it to the department of state, and obtain a new one, which shall have relation to the emanation of the first, was decided by this court at the last term in the case of Grant and others v. Raymond, 6 Peters, 220. The chief justice, in giving the opinion of the court, says, "but the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application; and if the new patent is valid, the law must be considered as satisfied, if the machine was not known or used before that application."

As this decision must be considered as settling the construction of the patent laws on this point, it is conclusive in the present case: and it is therefore unnecessary to examine the argument of the plaintiff's counsel, which was designed to lead to a different conclusion.

The second patent being a continuation of the first one, the rights of the plaintiff must be ascertained by the law under which the original application was made.

This law was passed on the 17th of April 1800, and provides "that all and singular the rights and privileges given to citizens of the United States respecting patents for new inventions, &c. shall be extended to aliens, who, at the time of petitioning, shall have resided for two years within the United States, &c. Provided, that every person petitioning for a patent for any invention, art or discovery, pursuant to this act, shall make oath or affirmation before some person duly authorized to administer oaths, before such patent shall be granted, that such invention, art or discovery, hath not, to the best of his or her knowledge or belief, been known or used, either in this or any foreign country; and that every patent which shall be obtained pursuant to this act, for any invention, art or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be utterly void."

By the act of the 21st of February 1793, which limits patent rights to citizens, it is provided "that every person or persons,

in his or their application for a patent. shall state that the machine, &c. was *not known or used* before such application."

The sixth section of this act provides that a defendant, when prosecuted for a violation of a patent right, may give in evidence, under a notice, among other matters, "that the thing secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person: in either of which cases, judgment shall be rendered for the defendant with costs, and the patent shall be declared void."

It would seem, from the above provisions, that citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases the right must be tested by the same rule.

From the facts in the case, it appears that the plaintiff, while residing in England, in 1813 or 1814, invented the instrument secured by his patent. That before he came to the United States, he made known his invention to his brother, to Mr Manton, a gun maker in London, and to others. That shortly after he came to the United States, in 1817, he disclosed his invention to a gun maker in Philadelphia, and that in 1817 or 1818, the plaintiff's brother sold the invention to a gun maker in London. That in 1819 the invention was sold and used in England; and that in the two following years it was in public use there, and in the latter year also in France. That on the 19th of June 1822, his first patent was obtained.

It also appears that in April 1807, a patent was granted in England to one Forsyth for fourteen years, for an invention on the same subject. This fact was shown by the plaintiff, it is presumed, as a reason why he did not take out a patent in England.

The question arises from these facts, and others which belong to the case, whether there was such a use in the public, of this invention, at the date of the plaintiff's first patent, as to render it void

By the plaintiff's counsel it is insisted, that if an invention has been pirated, or fraudulently divulged, the inventor cannot thereby lose his right to his own invention and property; and it makes no difference that the public have acquired the use of the invention without any participation in the fraud, unless the inventor has acquiesced in such use.

The right of the plaintiff to his invention, is compared to his right to other property, which cannot be divested by fraud or violence; and the case of Miller v. Taylor, 4 Burr. 2303, where seven judges against four held, that at common law, an author, by publishing a literary composition, does not abandon his right, is referred to as illustrative of the principle.

Several decisions by the circuit courts of the United States are cited to sustain the right of the plaintiff. In the case of Whittemore v. Cutter, 1 Gall. 482, the court say, "it will not protect the plaintiff's patent, that he was the inventor of the improvements, if he suffered them to be used freely and fully by the public at large for so many years, combined with all the usual machinery; for in such case, he must be deemed to have made a gift of them to the public, as much as a person who voluntarily opens his land as a highway, and suffers it to remain for a length of time devoted to public use."

In the case of Goodyear v. Matthews, 1 Paine's Rep. 301, the court, in substance, say, "that if the plaintiff be the inventor, it is immaterial that the invention has been known and used for years before the application." And in the case of Morris v. Huntington, 1 Paine, 354, the court say, that "no man is to be permitted to lie by for years, and then take out a patent. If he has been practising his invention with a view of improving it, and thereby rendering it a greater benefit to the public, before taking out a patent, that ought not to prejudice him. But it should always be a question submitted to the jury, what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent, should not be considered an abandonment or present of it to the public."

This was a case where a second patent had been obtained, the first being defective, and this, it would seem, was deemed sufficient to protect the right of the plaintiff, though the public

had been in possession of the invention for six years before the emanation of the second patent.

Of the same import are the cases cited from 4 Mason, 108; and 4 Washington, 438 and 703.

The question what use in the public before the application is made for a patent, shall make void the right of the patentee, was brought before this court by the case of Pennock and Sellars v. Dialogue, reported in 2 Peters, 1. In this case the court say that "it has not been, and indeed cannot be denied, that an inventor may abandon his invention and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute." And again, "if an invention is used by the public, with the consent of the inventor, at the time of his application for a patent; how can the court say, that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute; how can the court extract the case from its operation, and support a patent, when the suggestions of the patentee were not true; and the conditions, on which alone the grant was authorized, do not exist."

"The true construction of the patent law is," the court say, "that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use before he makes application for a patent."

In this case it appeared that the thing invented had been in use by the public, with the consent of the inventors, and through which they derived a profit, for seven years before the emanation of a patent. And this use was held by the court to be an abandonment of the right by the patentees.

The policy of granting exclusive privileges in certain cases, was deemed of so much importance in a national point of view, that power was given to congress in the federal constitution, "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

This power was exercised by congress, in the passage of the acts which have been referred to. And from an examination of

their various provisions, it clearly appears, that it was the intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only; and that on condition, that his invention was neither known nor used by the public, before his application for a patent. If such use or knowledge shall be proved to have existed, prior to the application for the patent, the act of 1793 declares the patent void; and as has been already stated, the right of an alien is vacated in the same manner, by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien.

The knowledge or use spoken of in the act of 1793, could have referred to the public only, for the provision would be nugatory if it were applied to the inventor himself. He must, necessarily, have a perfect knowledge of the thing invented and its use, before he can describe it, as by law he is required to do, preparatory to the emanation of a patent. But there may be cases, in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances no presumption can arise in favour of an abandonment of the right to the public, by the inventor; though an acquiescence on his part, will lay the foundation for such a presumption.

In England it has been decided that if an inventor shall suffer the thing invented to be sold, and go into public use for four months; and in a later case for any period of time, before the date of his patent; it is utterly void.

In that country the right emanates from the royal prerogative; in this, it is founded exclusively on statutory provisions. But the policy in both governments is the same, in granting the right, and in fixing its limits.

Vigilance is necessary to entitle an individual to the privileges secured under the patent law. It is not enough that he should show his right by invention, but he must secure it in the mode required by law. And if the invention, through fraudulent means, shall be made known to the public, he should assert his right immediately, and take the necessary steps to legalize it.

The patent law was designed for the public benefit, as well as for the benefit of inventors. For a valuable invention, the public, on the inventor's complying with certain conditions, give him, for a limited period, the profits arising from the sale of the thing invented. This holds out an inducement for the exercise of genius and skill in making discoveries which may be useful to society, and profitable to the discoverer. But it was not the intention of this law, to take from the public, that of which they were fairly in possession.

In the progress of society, the range of discoveries in the mechanic arts, in science, and in all things which promote the public convenience, as a matter of course, will be enlarged. This results from the aggregation of mind, and the diversity of talents and pursuits, which exist in every intelligent community. And it would be extremely impolitic to retard or embarrass this advance, by withdrawing from the public any useful invention or art, and making it a subject of private monopoly. Against this consequence, the legislature have carefully guarded in the laws they have passed on the subject.

It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery, for the period contemplated by law. But these can only be secured by a substantial compliance with every legal requisite. His exclusive right does not rest alone upon his discovery; but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed.

No matter by what means an invention may be communicated to the public, before a patent is obtained; any acquiescence in the public use, by the inventor, will be an abandonment of his right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor.

The invention passes into the possession of innocent persons, who have no knowledge of the fraud, and at a considerable expense, perhaps, they appropriate it to their own use. The inventor or his agent has full knowledge of these facts, but fails to assert his right: shall he afterwards be permitted to assert it with effect? Is not this such evidence of acquies-

cence in the public use, on his part, as justly forfeits his right?

If an individual witness a sale and transfer of real estate, under certain circumstances, in which he has an equitable lien or interest, and does not make known this interest, he shall not afterwards be permitted to assert it. On this principle it is, that a discoverer abandons his right, if, before the obtainment of his patent, his discovery goes into public use. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. Does this impose any thing more than reasonable diligence on the inventor? And would any thing short of this, be just to the public?

The acquiescence of an inventor in the public use of his invention, can in no case be presumed, where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will, in general, be a fact for the jury. And if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as for ever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public.

When an inventor applies to the department of state for a patent, he should state the facts truly; and indeed he is required to do so, under the solemn obligations of an oath. If his invention has been carried into public use by fraud; but for a series of months or years, he has taken no steps to assert his right; would not this afford such evidence of acquiescence as to defeat his application, as effectually, as if he failed to state that he was the original inventor? And the same evidence which should defeat his application for a patent, would, at any subsequent period, be fatal to his right. The evidence he exhibits to the department of state is not only ex parte, but interested; and the questions of fact are left open, to be controverted by any one who shall think proper to contest the right under the patent.

A strict construction of the act, as it regards the public use of an invention, before it is patented, is not only required

by its letter and spirit, but also by sound policy. A term of fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor; but if he may delay an application for his patent, at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him. A pretence of fraud would afford no adequate security to the public in this respect, as artifice might be used to cover the transaction. The doctrine of presumed acquiescence, where the public use is known, or might be known to the inventor, is the only safe rule which can be adopted on this subject.

In the case under consideration it appears the plaintiff came to this country, from England, in the year 1817, and being an alien, he could not apply for a patent until he had remained in the country two years. There was no legal obstruction to his obtaining a patent in the year 1819; but it seems that he failed to apply for one, until three years after he might have done so. Had he used proper diligence in this respect his right might have been secured; as his invention was not sold in England until the year 1819. But, in the two following years, it is proved to have been in public use there, and in the latter year, also in France.

Under such circumstances, can the plaintiff's right be sustained?

His counsel assigns as a reason for not making an earlier application, that he was endeavouring to make his invention more perfect; but it seems by this delay, he was not enabled, essentially, to vary or improve it. The plan is substantially the same as was carried into public use through the brother of the plaintiff, in England. Such an excuse, therefore, cannot avail the plaintiff. For three years, before the emanation of his patent, his invention was in public use, and he appears to have taken no step to assert his right. Indeed he sets up, as a part of his case, the patent to Forsythe, as a reason why he did not apply for a patent in England.

The Forsythe patent was dated six years before. Some of the decisions of the circuit courts, which are referred to, were overruled in the case of Pennock and Sellers v. Dialogue. They made the question of abandonment to turn upon the

intention of the inventor. But such is not considered to be the true ground. Whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances, protect his right.

The judgment of the circuit court must be affirmed with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel: on consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed with costs.

SYLVAN PEYROUX AND OTHERS, CLAIMANTS OF STEAMBOAT PLANTER, APPELLANTS v. WILLIAM L. HOWARD AND FRANCOIS VARION, LIBELLANTS.

A libel was filed in the district court of the United States for the eastern district of Louisiana, against the steamboat Planter, by H. and V., citizens of New Orleans, for the recovery of a sum of money alleged to be due to them, as shipwrights, for work done and materials found in the repairs of the Planter. The libel asserts that, by the admiralty law and the laws of the state of Louisiana, they have a lien and privilege upon the boat, her tackle, &c. for the payment of the sums due for the repairs and materials, and prays admiralty process against the boat, &c. The answer of the owners of the Planter avers that they are citizens of Louisiana, residing in New Orleans; that the libellants are also citizens, and that the court have no jurisdiction of the cause. Held, that this was a case of admiralty jurisdiction.

By the civil code of Louisiana, workmen employed in the construction or repairs of ships or boats enjoy the privilege of a lien on such ships or boats, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their rights. The state law, therefore, gives a lien in this case.

In the case of the General Smith, 4 Wheat. 438, S. C. 4 Peters's Condensed Reports, it is decided that the jurisdiction of the admiralty in cases where the repairs are upon a domestic vessel, depend upon the local law of the state. Where the repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on ships as security; and the party may maintain a suit in the admiralty to enforce his right. But, as to repairs or necessaries in the port or state to which the ships belong, the case is governed altogether by the local law of the state; as no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty.

The services in this case were performed in the port of New Orleans, and whether this was within the jurisdiction of the admiralty or not, depends on the fact whether the tide in the Mississippi ebbs and flows as high up the river as the port of New Orleans. The court considered themselves authorized judicially to notice the situation of New Orleans, for the purpose of determining whether the tide ebbs and flows as high up the river as that place; and being satisfied that although the current of the Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet the effect of the tide upon the current is so great as occasions a regular rise and fall of the water; New Orleans may be pro-

perly said to be within the ebb and flow of the tide, and the jurisdiction of the admiralty prevails there.

In order to the decision whether the admiralty jurisdiction attaches to such services as those performed by the libellants, the material consideration is, whether the service was essentially a maritime service, and to be performed substantially on the sea or tide water. It is no objection to the jurisdiction of the admiralty in the case, that the steamboat Planter was to be employed in navigating waters beyond the ebb and flow of the tide. In the case of the steamboat Jefferson, it was said by this court that there is no doubt the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide.

Some of the older authorities seem to give countenance to the doctrine that an express contract operates as a waiver of the lien: but it is settled at the present day, that an express contract for a stipulated sum is not of itself a waiver of a lien; but that, to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred.

APPEAL from the district court of the United States for the eastern district of Louisiana.

In the district court a libel was filed on the 10th December 1830, by Howard and Varion, shipwrights, residing in New Orleans, against the steamboat Planter, claiming the sum of two thousand one hundred and ninety-three dollars and thirty-five cents, being the balance asserted to be due to them for the price of work, labour, materials furnished and repairs made on the said boat, under contracts of 13th September and 19th October 1830; and alleging that, by the admiralty law and the law of the state of Louisiana, they had a lien on the said boat for the payment of the same; and that she was about leaving the port of New Orleans, and praying process, &c. The account for the work, materials, &c. was annexed to the libel.

The owners of the steamboat Planter filed a claim and plea setting forth that they were all citizens of Louisiana, all resided in the city of New Orleans, and that the libellants were also citizens of that state; and that therefore the district court of the United States had not jurisdiction of the case.

By a supplemental answer the respondents denied all the facts set forth in the libel.

The plea to the jurisdiction of the court was overruled and dismissed; and the parties proceeded to take the testimony of witnesses by depositions, which were filed as part of the proceedings in the case.

By the first contract, the shipwrights stipulated to do certain specified work, and furnish certain materials, the same to be approved by "experts," for which they were to be paid the sum of one thousand one hundred and fifty dollars.

By the contract of the 19th of October the Planter was to be hauled on shore, and in consideration of four hundred and seventy-five dollars, of which two hundred was to be paid in cash, and two hundred and seventy-five in one month after the boat should be launched and set afloat, certain other repairs were to be done to her, and she should be delivered and ready to receive a cargo by the 20th of November, under a penalty of twenty-five dollars per day for each day her delivery should afterwards be retarded by the shipwrights.

The evidence in the case is fully stated in the opinion of the court.

The district court made the following decree.

"The libellants claim a balance due them of two thousand one hundred and ninety-three dollars and thirty-five cents for work and materials furnished in the repairs of the steamboat Planter at the request of the claimants, and for which they have a lien by the local law. The claimants, in their first answer, deny the jurisdiction of the court, on the ground that all the parties were citizens of the same state, to wit, of Louisiana; that objection, however, was not insisted upon at the trial, and is not sustainable on the admiralty side of this court. In their supplemental answer, they deny generally the allegations of the libellants, and pray for the dismissal of the libel and damages. The whole account of the libellants against the owners amounts to three thousand six hundred and ninety-three dollars and thirty-five cents, including the amount of the written contracts entered into between the parties; of this sum they acknowledge the payment of one thousand five hundred dollars, leaving, as they allege, a balance of two thousand one hundred and ninety-three dollars and thirty-five cents due

them. By the first contract, made on the 11th September 1830 (the boat being then in the water), the libellants agreed, for the sum of one thousand one hundred and fifty dollars, to make certain repairs on that part of the boat which was above water, *from the wheel house to the bow;* and it was further stipulated, that if they made any other repairs, by replacing unsound timbers in any other part of the boat above water, not then discovered, they were to be paid separately for so much. After commencing the work, it was perceived that the boat required repairs under the water as well as above, and in consequence of that discovery, the claimants, through captain Jarreau, master of the boat and one of the owners, agreed to pay the libellants four hundred and seventy-five dollars for hauling out the boat, and for launching her when she should be repaired; and as the quantity of work to be done was uncertain, it was stipulated that an account of it should be kept, and if approved of by captain Jarreau, under whose inspection the work was to be done, the claimants bound themselves to pay the amount thus to be ascertained: this latter contract was made on the 19th October last. After the boat was *hauled out*, it appears the work under both contracts was carried on simultaneously. On a first view of the account current exhibited in this case, it would seem, from the dates, that at least a part of the work to be done under the first contract was again charged, but the subsequent testimony taken in this case shows that these charges were made on account of the extra repairs provided for under the first contract; and it further appears that all the charges made after the 19th of October, have no relation to the first agreement, but all relate to the work contemplated by the second contract. From the complexion of the testimony taken by the complainants, their real defence seems to be that the prices of the work charged are greater than they should be, that it was not executed in a proper manner, and that the libellants have forfeited a considerable sum of money in consequence of not delivering the boat within the time stipulated in the contract. As to the two first objections, the evidence is conclusive in favour of the libellants; captain Jarreau, himself, upon being shown the account, did not object to it; on the contrary, expressed himself satisfied with the work, and said

he was "not surprised at it, because there was a great deal more work done than he had any idea of;" with respect to the non-delivery of the boat at the time agreed upon, the fault chiefly attaches to captain Jarreau, who, in several instances, retarded the work by opposing repairs which were proposed by the libellants, but which turned out to be indispensable, and were afterwards ordered by him to be made; besides, he promised them indemnity against their obligation to pay twenty-five dollars a day for every day they were in default in delivering the boat, and gave as the reason, that they had to do more work than was at first anticipated. The charge of four hundred and seventy-five dollars, is for the specific service of hauling out and launching the boat, and must be allowed as such. On the whole, the evidence and exhibits in the case fully sustain the demand of the libellants; it is therefore ordered, adjudged and decreed, that the claimants pay to them the said sum of one thousand one hundred and ninety-three dollars and thirty-five cents, and costs of suit."

From this decree the owners of the Planter appealed to this court.

The case was argued for the appellants by Mr Morton. Mr Livingston submitted a printed argument.

For the appellants it was contended:

1. It does not appear, upon the proceedings, that the court below had jurisdiction.

2. That the libellants had waived any privilege or lien upon the said steamboat, under the laws of Louisiana, and therefore proceedings in rem were improper.

3. Though the court had jurisdiction, yet the decree rendered is erroneous.

On the first point, "that it does not appear, upon the proceedings, that the court below had jurisdiction;" Mr Morton contended, that jurisdiction should appear affirmatively, for the district courts of the United States are of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Kemp's Lessees v. Kennedy, 5 Cranch, 184; Walker v. Turner, 9 Wheat. 341. And this rule is ap-

plicable to all courts of inferior jurisdiction (Stanyon v. Davis, 6 Mod. 224; the Lord Coningsby's case, 9 Mod. 95); and has been adopted by the appellate court, from the earliest periods of judicial history, for the purpose of restraining inferior tribunals within their appropriate spheres of action, and preventing the possibility of their passing those bounds, even by the assent of parties below, to the erroneous exercise of power.

To sustain the jurisdiction of the court below, it must appear affirmatively, either that the Planter was a "foreign vessel," or, being a domestic vessel, that the lien or privilege created by the laws of Louisiana, constituted her a proper subject for the action of a court of admiralty. The first is not contended for on the part of the libellants; and to maintain the second, it must be shown affirmatively, that the Planter "was engaged in a maritime employment," being a navigation "super altum mare," or "substantially upon waters within ebb and flow of the tide;" constituting a case of admiralty jurisdiction, as recognized "by the law, admiralty and maritime, as it has existed for ages," which alone, the admiralty courts of the United States act under, and have authority to administer to the cases as they arise. The Steamboat Thomas Jefferson, Johnson claimant, 10 Wheat. 428; American Insurance Company v. Canter, 1 Peters's Rep. 545; The St Jago de Cuba, 9 Wheat. 409, 416; The General Smith, 4 Wheat. 438; Ramsey v. Allegree, 12 Wheat. 611; Ship Robert Fulton, 1 Paine's C. C. Rep. 545. Admiralty jurisdiction is not then to be inferred, because a vessel is the subject, and a state law has created a lien, however positively these facts may be alleged upon a record, and remain uncontroverted: a converse doctrine would have sustained the jurisdiction in the case of the Jefferson, before cited; and would equally establish an admiralty jurisdiction, where state laws had created liens, whether upon tideless rivers or upon the waters of the lakes: in all of which cases, it may be observed, that the vice-admiralty colonial courts would have exercised jurisdiction by virtue of their peculiar commissions; but not as cases of admiralty jurisdiction, which they never were, and to constitute them such would not be within the power of congress: though to a certain extent, a jurisdiction over them might be conferred upon

the district courts, under the power "to regulate commerce among the states," as is intimated in the case of the Jefferson. For the extent of power conferred on the vice-admiralty courts by their commissions, see 2 Gall. 470, note 47, for Commis. of V. Ad. Court.

"A libel not alleging a thing done 'super altum mare,' nothing appears to give the court jurisdiction; for a man shall not sue in the admiralty only because it is a vessel." "The principal" must be shown to be within their jurisdiction. Shermoulin v. Sands, 1 Lord Raym. 271; 1 Kent's Com. 363; Hall's Ad. Prac. 135, 137; 2 Brown's Civ. and Ad. Law, 271.

What does appear upon the record, is relied upon to be sufficient for inferring jurisdiction in the court below.

The libel only alleges, that the libellants have a lien and privilege upon said boat by the admiralty law, and by the law of Louisiana; being merely a statement of consequences, that could but give jurisdiction of the case to the court as a result, should it appear by further facts, that the Planter was engaged in a "maritime employment," navigating "super altum mare," or "waters within ebb and flow of the tide;" neither of which are to be found in any part of the record of the proceedings below, and in the absence of which, the clear bearing of the authorities indicates that no jurisdiction can ever be inferred: "the case not appearing to be a maritime contract, nor made such by the state law," which it is admitted must be done to maintain the jurisdiction of the court.

It would seem to have been conceded on the part of the libellants, that were the inception, progress and *termini* of the Planter's employment, beyond ebb and flow of the tide, or substantially such, the case would clearly be within that of the Thomas Jefferson, 10 Wheat. 428. It is submitted with some confidence, that this state of facts is but a fair inference from the whole record of the case.

It is by no means conceded that New Orleans is within the ebb and flow of the tide; on the contrary, that the court will notice the notorious and historical fact that it is beyond the ebb and flow of the tide; that the Mississippi river is not an arm of the sea, nor an inlet from the ocean, but an inland river, whose current assumes but one course or flux to the

ocean, and is uninfluenced by its tides. The Apollon, 9 Wheat. 374. 3 Dall. 297. Hooker v. Cummings, 20 Johns. Rep. 98. Malte Brun's Geography, vol. 5, p. 58, book 79, ed. of 1826. Stoddard's Louisiana, 164, ch. 4.

An arm of the sea is where the sea or tide "flows and reflows." Sir Henry Constable's case, 5 Coke's Rep. 107. A navigable river is also considered as an arm of the sea; but there is an important distinction between the legal and popular import of the term "navigable," as applied to rivers; and no part of the law is more clearly settled, than that to determine, whether or not a river is navigable, a regard must be had to the "ebbing and flowing of the tide." For those streams of water which are of public use for inland navigation above the line to which the tide ordinarily flows, are strictly "not navigable," though they are public highways, for the purpose of transportation; although the water is fresh at full tide, yet the river is still an arm of the sea if it "flows and reflows."

This has never been controverted in England, and is well settled in this country. Angell on tide waters, chap. 4, p. 60, ed. of 1826, where will be found collected all the English and American authorities upon the subject.

"The tide is not felt at New Orleans. The rise and fall of the river is caused exclusively by the rainy and dry season in the interior; at low water the flow to the sea is scarcely perceptible." From the surveyor general of Louisiana. Hall's Travels, vol. 2, 284.

The tides have little effect upon the water at New Orleans. They "sometimes" cause it to "swell" but never to "slacken its current." Stoddard's Louisiana, 164, ch. 4.

The employment of the Planter, thus, in its inception, appearing not to have been of a maritime nature, is shown in its further progress to have been exclusively beyond the ebb and flow of the tide. The second contract states that the boat is to be delivered "ready to receive a cargo." The testimony shows her to have been "launched and partly laden." The return of the marshal shows her redelivery to claimants. The testimony of Wilson states Jarreau to have acted as commander when the Planter was launched, and as commanding her at the time witness gave his evidence. The

affidavit of claimants states that Captain Jarreau was then navigating "on the Mississippi, between New Orleans and Bayou Sarah, and on the Red river between New Orleans and Alexandria."

As in the case of the Jefferson, the court noticed that Shipping port was beyond ebb and flow of tide, without any positive evidence appearing on the record; so will they notice the same fact, as to New Orleans, Bayou Sarah, Alexandria, Baton Rouge, and Red river. The last four places being also historically noted as equally beyond tide water. Darby's Louisiana, 95, 197. Stoddard's Louisiana, 165, 186.

The record then affords evidence that the Planter, having been redelivered to the claimants, and laden with cargo, was employed, not in "maritime service," nor in trading "to Mobile, Pensacola, or intermediate places," but in navigating between New Orleans, Bayou Sarah, Red river, and Alexandria, presenting a case of "interior trade," wherein the inception, intermediate progress and termination of the voyage were wholly beyond admiralty jurisdiction. On the part of the libellants, it is assumed that New Orleans is within tide water, and a doctrine thereupon is applied drawn from the case of the Jefferson, 10 Wheat. 428, that admiralty jurisdiction is sustainable when the "*inception*" of the contract, &c. is thus circumstanced. But that case we suppose to establish a converse doctrine. The "*inception*," &c. being there noticed by the court as not answering to the idea of a navigation "substantially" beyond tide waters, so as to oust admiralty jurisdiction, and consequently not sufficient to confer jurisdiction, were alone relied upon as substantially "a maritime employment."

It is not perceived in what manner the inferences adverse to the jurisdiction below become negatived, or the defective libel aided through the evidence of a public act making New Orleans a port of entry. Could an analogous law for Shipping port in Kentucky, have varied the views taken by the court of that case? The general collection law of March 1799, sec. 4, creates various ports of entry and delivery upon Lake Champlain, Ontario, and Lake Erie; and supposing a case similar to the present to be now before the court from the northern district of New York, the force of these laws is not realized, if

invoked to aid the court in determining admiralty and maritime jurisdiction upon those waters. "Cases in admiralty do not arise under the constitution and laws of the United States." Amer. Ins. v. Canter, 1 Peters, 545.

The pleadings on the part of the claimants are not only sufficient to sustain all the exceptions now taken, but to warrant the inference, that they were taken below and overruled. They plead to the jurisdiction: first, on the ground that all the owners are residents, &c., which having been overruled, subsequently a supplemental answer and plea were filed, denying generally all the allegations contained in the libel. Neither the reasons for disallowing the objections to the jurisdiction, if offered, under both of these pleadings, nor the objections themselves, appear; the court below, alone noticing that part of the evidence, upon which, "in *its judgment*" the real defence of the claimants rested.

Under the first point then, it is believed that the court will either dismiss the case as not showing jurisdiction upon the face of the proceedings, or remand the same, for the purpose of settling the facts upon which the jurisdiction must rest, if it is to be sustained.

The second point made on the part of the appellants is—that the libellants had waived any privilege or lien upon the boat, under the laws of Louisiana, and, therefore, proceedings "in rem" were improper.

In other words, that the inference is fairly deducible from the case, that it was within the contemplation of the parties, that their contracts should not create a right to "provisional seizure," under articles 284 and 289 of the Code of Practice of 1830, p. 104, and article 2748 of the Civil Code.

It is observed on the part of libellants, that, in this case, extraordinary diligence was used to enforce a right which would have been lost, had the vessel been permitted to depart without its exercise; and the inference would seem to be suggested, that probably such a state of things was within the contemplation of libellants, when entering into the agreements. It is certainly true, that article 2748, referred to, declares the privilege to cease, if the boat is allowed to depart without exercising the right of seizure.

But this effect takes place only, if the contract should not have been reduced to writing; and if the amount should exceed five hundred dollars, and the contract be *reduced to writing*, the privilege may be unlimited. Civil Code, article 2743, 2747. The "curia philippica," "quoad" liens or privileges on vessels, is supposed to have been abrogated by articles 3521, 2746 and 2748 of the Louisiana civil code, although referred to as yet subsisting, in a note to Abbott on Shipping, p. 116, ed. of 1829.

The reducing the contract to writing, may then be fairly taken as expressing the intention of the parties, that the right to a provisional seizure should be wholly suspended, but the right preserved until the return of the vessel, and to be exercised only in the event of a failure of personal responsibility on the part of claimants, to which, by the terms of the contract of 19th October, the libellants alone think proper to look. That full reliance must have been placed in the immediate return of the Planter to New Orleans, is apparent, from the fact of her ownership and commercial employment there, as well as by the evidence upon the record, showing New Orleans to have been the inception and termini, after her voyage upon the rivers throughout the interior of the country. And as conclusively affirming this view of the intention of the libellants, is the further fact evidenced by the contract of the 19th October, of extending a *credit* of two hundred and seventy-five dollars, forming a portion of the aggregate sum, to one month after the Planter should have been launched, set afloat and delivered, ready to receive a cargo—an evident suspension of the right to provisional seizure, until after the Planter must have left the jurisdiction of the court, showing clearly that such an understanding existed between the parties as justifies an application of the principle in the note to Raitt v. Mitchell, 4 Campbell, 150, and which is conceded to be entirely compatible with the laws of Louisiana.

The construction placed upon the contract of 19th October by the libellants, limits it to "thirty days after the vessel should be set afloat;" but it is presumed this limitation will not be sanctioned, and when the whole contract is brought

into notice and its parts viewed in connexion, that construction contended for by the appellants, must be affirmed.

Under the second point, then it is admitted, that superadding to other corroborating circumstances, the extension of credit for a portion of the aggregate amount involved, to a period after the right to provisional seizure could have been exercised, brings the case within the doctrine of Raitt v. Mitchell, 4 Campb. N. P. 150.

The third point relied upon by the appellants is, that the decree rendered, is erroneous. In support of this position Mr Morton went into a particular examination of the evidence. This part of the argument is stated and examined in the opinion of the court.

The decree rendered is further erroneous, in that it directs four hundred and seventy-five dollars, charged in the account of libellants for drawing the boat out of the water, to be paid to them; of which sum, two hundred and seventy-five dollars, by the express terms of the contract of 19th October, were not demandable until "one month after the libellants had delivered the Planter afloat, and ready to receive a cargo."

[Here the counsel went into a particular examination of the evidence.]

The regulation of the subject of "liens or privileges," and provisional seizure, by the laws of Louisiana, will be found mainly to have in view the internal trading navigation of the country, from New Orleans. Art. 284 of the Code of Practice of 1800, which is a comment upon Art. 2748 of the Civil Code, has alone reference to "water craft within the state," and Art. 289 of the same, after dealing much in detail upon "lien and provisional seizure of ships, vessels or water craft, navigating within the state," in a separate section, and as an exception to the general purview and scope of the legislation, further provides that "such seizure may be made 'even' of ships or vessels trading out of the state," and their laws appear to have had in view, among other subjects, the intricate matters of dispute, involved with the peculiar internal steamboat navigation from New Orleans, by affording various aids and facilities, susceptible of being adapted to most of the difficulties that would arise, and of which aids their courts have express power

to avail themselves. Thus from Art. 441 to 461 of the Code of Practice of 1830, are recognized, "experts," persons versed in the knowledge either of a science, an art, or a profession, selected in order to give their opinion, on some point or question, on which the decision of a cause depends." Also, "auditors" of accounts, "judicial" arbitrators, &c. &c. whose detailed services are therein fully enumerated; but none of whom, it is supposed, could be required to act by the district court of the United States, however essential to the elucidation of a cause.

From the decisions of the inferior tribunals, invested with cognizance of these cases, the right of appeal, and a speedy final determination of the appellate court is carefully provided for by art. 570 to 603 of the Code of Practice for Louisiana of 1830.

In conclusion, it is submitted that, if the inference be not decidedly adverse to the jurisdiction below, upon the face of the proceedings, yet important facts identified with that jurisdiction, do appear of so doubtful and unsettled a character as to render it proper to remand the case for a satisfactory establishment of those facts.

That, although it should be considered that proceedings below "in rem" were proper, yet material errors having been obviously incorporated with the decree, renders its enforcement impossible, and makes it now essential for the ends of justice, that the whole subject be remanded for that full re-investigation, through which those ends can alone be attained.

Mr Livingston, for the appellees, stated:

The main objection to the decree in this case is, that the district court of Louisiana, as a court of admiralty, had no jurisdiction of the case.

The libellants contend for the jurisdiction on the privilege granted by general maritime law; and on the express lien given by the laws of the state.

1. The general maritime law. Cases are abundant to show that shipwrights have a privilege on the ship for repairs and a right to libel her to enforce it. Roll's Ab. 533; 1 Peters's Admiralty Reports, 227, 233.

2. The laws of the state give the privilege without reducing the agreement to writing, as is required in other cases. Louisiana Civ. Cod. art. 2748.

It is argued that a state law cannot give jurisdiction to a court of the United States. In one sense this is true: a state law cannot extend such jurisdiction, but they may create a right which can only be enforced by such a court. For instance, by the general admiralty law, a master of a ship cannot sue in the admiralty for his wages by a libel on the ship, because, by the maritime law, he has no lien on the vessel. But suppose a state law to give such lien for all contracts made with the owners in the state, the maritime court of the United States, it is apprehended, would take cognizance of the case, and enforce the law. This, it is acknowledged, would not be done unless the case made by the state is a maritime contract. Is this such an one? In the case of Jefferson, 10 Wheat. the mariners could not sue in the district court, because the service, in its inception, progress and termination, was above the ebb and flow of the sea; the inference then is plain, that if the contract and service had, either in the beginning, end, or any intermediate point, been within the ebb and flow of the sea, the decision would have been different. In the present case the contract was made, the work begun and completed in a seaport, where there is a regular flux and reflux whenever the river is in its ordinary state.

Should it be objected that it does not appear that the steamboat in question was intended, after her repair, to navigate within the ebb and flow, the answer is, first, that the presumption must be that she was intended to navigate to and from the place where her owners resided and where she was repaired; that, at any rate, the inception of her first voyage must be from the seaport where she was. Whether to go on the coasting trade by sea to Mobile, Pensacola, or the intermediate places, or to ply between the sea and the port, is at least as probable as that she was for the interior trade. Nor was it necessary for the libellants to state this. In a libel for repairs of a vessel, it is sufficient to describe it by the name given to vessels of that class, as ship, schooner, &c. without averring that the repairs were intended to enable her to prose-

cute a sea voyage; yet vessels of all descriptions sometimes navigate waters above the flux and reflux of the sea. So, in the present case, it was sufficient to call the vessel, on which the repairs were done, a steamboat; for steamboats are as frequently, and perhaps more so, employed on tide-water, as above it. If the exception were material, it ought to have been made by the answer; but here the objection in the answer is merely to the person of the libellants.

If it should be objected that the fact of New Orleans being within the ebb and flow of the sea is not in evidence, the answer is, that there are notorious facts with which courts are supposed to be conversant, and of which they will take notice without further proof. Thus, in the case of La Vengeance, 3 Dall. 297, 1 Peters's Cond. Rep. 132, the court takes official notice of the situation of Sandy Hook; and in the case from 20 Johnson, cited by the defendant, they assume, in like manner, that Salmon river is a fresh water river, and that it has no flux and reflux. In the case before the court, there is moreover the evidence of a public act, making New Orleans a port of entry and delivery.

The second error assigned in the printed statement is, that the libellants had waived any privilege or lien on the steamboat by the laws of Louisiana. If this were made out, it would not affect the right of the libellants under the law maritime. But it is not perceived that there is any evidence of such waiver. The article which gives the privilege declares that it shall be lost if the party suffer the vessel to depart without exercising the right; and this is the only condition. But in this case extraordinary diligence was used, and the libel calls for the immediate interposition of the court to prevent the departure. The vessel crossed the river from the ship-yard on the 8th of December, the libel was filed on the 10th, and the seizure made on the 11th of the same month.

That an express contract for a specific sum is not a waiver of the privilege is proved by the case cited by the defendant from 4th Camp. 150. Such a rule could only have been made by using the word *credit* in a sense in which it was not employed. The workman may be said to perform his labour on the credit of the owner, when he takes his promise for a certain

sum to be paid in cash on the finishing of the work; and in this sense the rule applies, and was considered an implied waiver of the privilege. In the case before the court there are two different contracts, both written. By the first, for certain specified repairs, the owners agree, "in the name of the boat," to pay in cash one thousand one hundred and fifty dollars; by the second, it being found it would be necessary to haul up the boat, four hundred and seventy-five dollars were agreed to be paid for that service, two hundred in cash, and two hundred and seventy-five in thirty days after the boat should be set afloat; and it is further agreed that the libellants should caulk and repair the boat so that she shall not leak, to be paid for as soon as the account shall be approved. Here, it will be observed, that no term of time was given for any part except the two hundred and seventy-five dollars for hauling up the boat; this was to be paid thirty days after the boat was *set afloat*. When that happened does not appear. She came over to the town side of the river on the 8th of December, but when she was launched was not said. Part of the one thousand five hundred dollars paid may then be reasonably imputed to this balance of two hundred and seventy-five dollars, because the debt for the extra repairs was not due until they were finished, and it appears they were not finished until the suit was brought. Where then there are two debts, one already payable, the other not, a sum paid without designation shall be imputed to that which is due. Civil Code, article 2162. Therefore, this part of the debt, on which credit was given being extinguished, no question can arise as to the lien for the balance.

There remain now only the objections to the sum allowed. On this point the court is referred to the full and conclusive testimony offered by the libellants, that all the materials and workmen they furnished were necessary—that they were actually furnished—that they are not overcharged—that the work was carried on under the inspection of the captain, and was acknowledged to have been executed to his satisfaction.

Mr Justice Thompson delivered the opinion of the Court.

This case comes up from the district court of the United

States for the eastern district of Louisiana. The proceedings in the court below were in rem against the steamboat Planter, to recover compensation for repairs made upon the boat.

The libel states that Howard and Varion, shipwrights, residing in the city of New Orleans, had found materials and performed certain work on the steamboat Planter, for which the said steamboat and her owners were justly indebted to them in the sum of two thousand one hundred and ninety-three dollars and thirty-five cents; and alleges that by the admiralty law, and the laws of the state of Louisiana, they have a lien and privilege upon the boat, her tackle, apparel and furniture for the payment of the same; and prays admiralty process against the boat, and that the usual monition may issue.

The appellants afterwards appeared in court and filed their claim and plea, alleging that they are citizens of Louisiana, and residing in the city of New Orleans, and that they are the sole and lawful owners of the steamboat Planter; and alleging further, that the libellants are also citizens of the same state, and that the court had no jurisdiction of the case.

The plea to the jurisdiction of the court was overruled, and a supplemental and amended claim and answer filed, denying all and singular the facts set forth in the libel; and by consent of parties an order of court was entered, that the testimony of the witnesses for the respective parties be taken before the clerk of the court, and read in evidence upon the trial, subject to all legal exceptions; and upon the hearing of the cause the court decreed that the claimants should pay to the libellants two thousand one hundred and ninety-three dollars and thirty-five cents, and costs of suit. An appeal to this court was prayed and allowed.

Upon the argument here, the following points have been made.

1. It does not appear upon the proceedings, that the court below had jurisdiction of the case.

2. That the libellants had waived any privilege or lien upon the steamboat under the law of Louisiana, and therefore proceedings in rem were improper.

3. If the court had jurisdiction, the decree is erroneous on the merits.

The want of jurisdiction in the district court is not put on the ground set up in the plea in the court below, that all the parties were citizens of the same state. This has been very properly abandoned here, as entirely inapplicable to admiralty proceedings in the district court. But it is said that it does not appear upon the face of the proceedings, that the cause of action properly belonged to admiralty jurisdiction. There can be no doubt that it must appear from the proceedings, that the court had jurisdiction of the case.

The proceeding is in rem against a steamboat, for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract; and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the state of Louisiana, it will bring the case within the jurisdiction of the court.

By the Civil Code of Louisiana, article 2748, workmen employed in the construction or repair of ships and boats enjoy the privilege established by the code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law, therefore, gives a lien in cases like the present.

In the case of the General Smith, 4 Wheat. 438, it is decided, that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the state. Where the repairs have been made, or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the admiralty to enforce his right. But as to repairs or necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty.

It is said, however, that the place where these services were performed, was not within the jurisdiction of the admiralty,

The services in this case were performed in the port of New Orleans, and whether this was within the jurisdiction of the court or not, will depend upon the fact, whether the tide in the Mississippi ebbs and flows as high up the river as New Orleans.

This is a question of fact, and it is not undeserving of notice, that although there was a plea to the jurisdiction of the court interposed, the objection was not set up. Had it been put in issue, the evidence would probably have removed all doubt upon that question; not having been set up, it affords an inference that the objection could not have been sustained by proof.

But we think we are authorized judicially to notice the situation of New Orleans, for the purpose of determining whether the tide ebbs and flows as high up the river as that place. In the case of the Apollon, 9 Wheat. 374, it is said by this court, that it has been very justly observed at the bar, that the court is bound to take notice of public facts and geographical positions: and in the case of the steamboat Thomas Jefferson, the libel claimed wages earned on a voyage from Shipping port in the state of Kentucky, up the river Missouri, and back again to the port of departure. And the court say, that the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide, and, therefore, in no just sense can the wages be considered as earned in a maritime employment. It is fairly to be inferred, that the court judicially noticed the fact, that the tide did not ebb and flow within the range of voyage upon which the services were rendered, as there is no intimation of any evidence before the court to establish the fact.

It cannot certainly be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof; which the court may judicially notice. Thus in the case of the United States v. La Vengeance, 3 Dall. 297, 1 Peters's Cond. Rep. 132, the court judicially noticed the geographical position of Sandy

Hook. And it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide.

The appellants' counsel has referred the court to Stoddard's Louisiana, 164, for the purpose of showing that the tide does not ebb and flow at New Orleans; but we think it affords a contrary conclusion. The author says, "the tides have little effect upon the water at New Orleans; they sometimes cause it to swell, but never to slacken its current." No distinction has ever been attempted in settling the line between the admiralty and common law jurisdiction, growing out of the greater or less influence of the tide. So far as that admiralty jurisdiction depends upon locality, it is bounded by the ebb and flow of the tide; and if the influence of the tide is at all felt, it must determine the question. No other certain and fixed rule can be adopted: and in determining this, we must look at the ordinary state of the water, uninfluenced by any extraordinary freshets.

The authority of Mr Stoddard goes to show that the tides have some effect upon the water at New Orleans; they cause it to swell, but not so much as to slacken the current. In the case of Rex v. Smith and others, 2 Doug. 441, it became a question whether the sea could properly be said to flow above London bridge. It was contended that the tide beyond that limit was occasioned by the pressure and accumulation backwards of the river water. Lord Mansfield said, a distinction between the case of the tide occasioned by the flux of sea water or by the pressure backwards of the fresh water of a river, seemed entirely new.

We think that although the current in the Mississippi, at New Orleans, may be so strong as not to be turned backwards by the tide; yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide.

It has been argued on the part of the appellant, that the evidence shows that this steamboat was to be employed in navigating waters beyond the ebb and flow of the tide, and therefore not employed in the maritime service. In the case of the steamboat Jefferson, the court said, there is no doubt the juris-

diction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service, and to be performed substantially on the sea or on tide water. All the service in the case now before the court was at New Orleans; and the first voyage, at all events, was to commence from that port. The objection, therefore, to the jurisdiction of the court cannot be sustained.

2. The second exception is founded on a supposed waiver of any privilege or lien, and that the appellees trusted alone to the personal responsibility of the owners of the steamboat.

To determine this question, it becomes necessary to look at the contracts under which the repairs were made.

The first bears date on the 11th of September 1830, by which certain specified repairs were to be made, for which the appellants stipulated to pay one thousand five hundred dollars. No time is fixed for the payment. The repairs contemplated by this contract were such only as could be made without hauling up the boat. In the progress of the work, however, it was discovered that more repairs were necessary than had been supposed, and which could not be made without hauling up the boat. And on the 19th of October 1830, another contract was entered into, by which the owners agreed to pay four hundred and seventy-five dollars for hauling up the boat, two hundred dollars of which was to be paid in cash, and the balance in one month after the boat shall be launched and set afloat. The boat was then to be repaired under the instruction of Captain Jarreau, the work to be paid for when the account shall be approved by Captain Jarreau. The boat to be repaired and delivered afloat by the 20th of November, ready to receive a cargo; the appellees were to allow twenty-five dollars a day for each day *they retarded* the delivery.

An express contract having been entered into between the parties under which these repairs were made is no waiver of the lien, unless such contract contains stipulations inconsistent with the lien, and from which it may fairly be inferred that a waiver was intended, and the personal responsibility of the party only relied upon. Express contracts are generally made

for freight and seamen's wages, but this has never been supposed to operate as a waiver of a lien on the vessel for the same. There are certainly some of the older authorities which would seem to give countenance to the doctrine that an express contract operated as a waiver of the lien; but whatever may have been the old rule on the subject, it is settled at the present day, that an express contract for a specific sum is not of itself a waiver of the lien, but that to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. Hutton v. Bragg, 2 Marshall, 339; 4 Camp. 145, and the cases cited in note.

Applying these rules to the case before us, we can discover nothing (except as to two hundred and seventy-five dollars, the balance for hauling out the boat, which will be noticed hereafter), inconsistent with the right of a lien, or indicating any intention to waive it. In the first contract no time is fixed for the payment of the one thousand five hundred dollars; it became payable, therefore, as soon as the work was completed. And the repairs under the second contract were to be paid for as soon as the account was approved by Captain Jarreau. There is nothing, therefore, from which it can be inferred that any time of credit was to be allowed. The balance of two hundred and seventy-five dollars, for hauling out the steamboat, stands upon a footing a little different. That was to be paid in one month after the boat was launched and set afloat. A credit was here given; and a credit too beyond the time when, in all probability, the boat would have left the port of New Orleans; for it can hardly be supposed that it would have taken thirty days to load her. And by the Civil Code of Louisiana, Art. 2748, the privilege ceases if the ship or boat is allowed to depart without exercising the right.

As to this sum, therefore, the decree is erroneous.

3. The principal ground of complaint under the third point made at the bar is, that the appellants have been made to pay twice for some part of the work. That is, that part of the work which was to be done under the first contract, and for which they were to pay one thousand five hundred dollars, has

been charged under the second contract. There is certainly some confusion growing out of the manner in which this work was carried on under the different contracts. The work which was to be performed under the first, was not completed when the second was entered into, and both being carried on at the same time, might very easily occasion some mistake. And in addition to this, there was, under the first contract, some extra work to be done and paid for over and above the stipulated sum of one thousand five hundred dollars, which rendered it still more difficult to keep the accounts for materials and labour under the different contracts, separate and distinct. The evidence was taken in writing out of court, and no opportunity afforded for explanation upon these points. The district judge, feeling the difficulties growing out of these circumstances, ordered Wilson, one of the witnesses whose deposition had been taken and read in evidence, to appear and answer in open court. He was the clerk of the appellees, who had kept an account of the timber used and work performed; and on his examination he swore that all the charges and items for work done, in the account of the libellants, were over and above the work done under the first contract for one thousand five hundred dollars. That the libellants had hands at work at the repairs under the contract and the extra work at the same time. That there is not a day's work nor a foot of plank charged in the account which was to be done under the first contract. This testimony leaves no reasonable doubt of the correctness of the account. By the second contract, payment was to be made when the account was approved by Captain Jarreau; no formal approval appears to have been made. But he was a part owner, and superintended the repairs; and one of the witnesses says he was present when the account was presented to Captain Jarreau, who said he was not surprised at it, because there was a great deal more work than he had any idea of; and that he did not think at first that she required so much. This, although not a direct, was an implied approval of the account.

The delay in not delivering the boat to the appellants by the time specified in the contract, was occasioned by her unexpected state and condition, and the extent of repairs required.

And besides the delivery at the time mentioned in the contract, was dispensed with by captain Jerreau.

Upon the whole, we are of opinion, that the decree of the district court, as to the two hundred and seventy-five dollars, must be reversed, and in all other respects affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: on consideration whereof, it is the opinion of this court that the decree of the said district court as to the two hundred and seventy-five dollars is erroneous and should be reversed, and that in all other respects the said decree should be affirmed: whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause, as to the balance of two hundred and seventy-five dollars for hauling out the steamboat, be, and the same is hereby reversed, and that the said decree in all other respects be, and the same is hereby affirmed; and it is further ordered, that each party pay his own costs in this court.

HOLLINGSWORTH MAGNIAC AND OTHERS, PLAINTIFFS IN ERROR v. JOHN R. THOMPSON.

The whole charge of the circuit court was brought up with the record. By the court. This is a practice which this court have uniformly discountenanced, and which the court trusts a rule made at last term will effectually suppress.

This court have nothing to do with comments of the judge of the circuit court upon the evidence. The case of Carver v. Jackson, 4 Peters, 80, 81, cited upon this point.

The question now before the court is, whether the charge to the jury in the circuit court contains any erroneous statement of the law. In examining it for the purpose of ascertaining its correctness, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. The whole is to be construed as it must have been understood, both by the court and the jury, at the time it was delivered.

Upon principle and authority, to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a strong resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is bona fide, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors.

Fraud may be imputed to the parties, either by direct co-operation in the original design, at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design upon such notice into operation.

Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his own wife.

Marriage articles or settlements are not required by the laws of New Jersey to be recorded, but only conveyances of real estate: and as to conveyances of real estate, the omission to record them avoids them only as to purchasers and creditors, leaving them in full force between the parties.

ERROR to the circuit court of the United States for the eastern district of Pennsylvania.

In the circuit court of Pennsylvania, at October sessions 1826, a feigned issue was made up between the plaintiffs and the defendant, to try the question of the ability of the defendant to pay a debt acknowledged to be due to the plaintiffs, and for which judgments had been obtained in their favour. The competency of the defendant to satisfy the debt, depended on the validity of a certain marriage settlement, made in contemplation of marriage between the defendant and Miss Annis Stockton, daughter of Richard Stockton, Esq., late of New Jersey, to which instrument Mr Stockton was a party, he being, by its provisions, the trustee of his daughter. The marriage settlement was as follows:

"Articles of agreement and covenant made and executed this nineteenth day of December, in the year of our Lord one thousand eight hundred and twenty-five, by and between John R. Thompson, Esq., late of the city of Philadelphia, of the first part, Annis Stockton, daughter of Richard Stockton, Esq., of the second part, and Richard Stockton, of the county of Somerset and state of New Jersey, father and trustee of the said Annis Stockton, of the third part.

"Whereas a marriage is intended to be shortly had and solemnized between the said John R. Thompson and the said Annis Stockton; and whereas the said Richard Stockton has promised to give unto his said daughter a certain lot or tract of land, belonging to him, situate in the county of Middlesex and state of New Jersey, directly opposite the mansion house of the said Richard Stockton, between the old road to Trenton and the turnpike road, which consists of between four and five acres of land, be the same more or less, and is bounded on the north and south by the said roads, on the west by lands of Dr John Vanclave, and the east by a line to be run from the north east corner of the garden now in the possession of Mrs Abigail Field, to the said turnpike road, upon which said lot the said John R. Thompson has begun to build a house. Now, it is hereby agreed between the parties aforesaid, and the said Richard Stockton, for himself and his heirs, doth hereby covenant and agree to and with the parties of the first and second

parts, their heirs, executors, and administrators, in consideration of the said marriage, and of the love and natural affection he hath for his said daughter, that from the time of, and immediately after, the said marriage shall be solemnized, he, the said Richard Stockton, shall and will stand seised of the said lot and premises, and of all and singular the buildings and improvements which shall be erected and made thereon by the said party of the first part, to uses, trusts, and purposes hereinafter mentioned, and to none other, that is to say: in trust to permit the said John R. Thompson, and Annis his wife, during the time of their joint lives, to possess, live in, and occupy the said lot, house, and premises, with the appurtenances, free and clear of all demands; and in case the said parties of the first and second parts do not think proper to inhabit and reside in the said premises, that he, the said Richard Stockton, will let out upon lease the said premises, and receive the rents, issues and profits thereof, and pay over the same to the said Annis, party of the second, during the joint lives of the parties of the first and second parts. And if the said John R. Thompson should survive the said Annis Stockton and have issue by her, then in trust to permit the said John R. Thompson, during his life, to inhabit and occupy the said premises, if he elect so to do, free and clear as aforesaid, and pay over the said rents and profits, as he shall receive the same, to the said John R. Thompson, for the maintenance and support of him and his family, without he, the said John R. Thompson, being at any time thereafter accountable to any person or persons for the said rents and profits. And after the death of the said John R. Thompson, in trust for the child or children of the said marriage, in equal shares as tenants in common, in fee simple; and if there shall be no child or children of the said marriage, then, upon the death of either of the said parties of the first and second parts, in trust to convey the said premises to the survivor in fee simple. And the said John R. Thompson, for himself, his heirs, executors and administrators, doth covenant and agree to and with the parties of the second and third parts, that if the said marriage shall take effect, and in consideration thereof, he will, with all convenient speed, build and furnish the said house in a suitable manner, as he shall judge fit and

proper; and that the said erections, improvements and furniture, together with the changes and additions which shall be from time to time made, shall be subject to and included in the said trusts, as far as the same are applicable to each species of property. And further, that he will, in the space of one year from the time the said marriage shall take effect, place out on good security, in stock, or otherwise, the sum of forty thousand dollars, and hand over and assign the evidences thereof to the said party of the third part, who shall hold the same in trust to receive the interest, profits, or dividends thereon, as they shall from time to time arise, to the said party of the second part during the joint lives of the parties of the first and second parts, and that her receipts for the same, and also for what may be produced under the before mentioned trusts, shall be good and valid, notwithstanding her coverture. If the said party of the second part should die before the said party of the first part, and there should be issue of the said marriage, then in trust to receive the said interest, profits and dividends, and pay the same over from time to time to the said party of the first part, during his life, for the support of himself, and the maintenance and education of his children, without his being subject to any account as aforesaid; and after his death, in trust for any child or children of the said marriage in equal shares; and if the said Annis should survive the said John, and there be issue of the said marriage, then to pay over the same to the said Annis, during her life, for her maintenance, and the support and education of the said children, and without her being liable to any account for the same; and after her death, in trust for the child or children of the said marriage in equal shares; and if there shall be no child or children of the said marriage, then upon the death of the said John R. Thompson, or Annis his wife, in trust, to assign and deliver the said securities, and all moneys remaining due, to the one who shall survive, to his or her own uses. And it is further agreed and covenanted by and between the parties aforesaid, that it may be lawful for the said John R. Thompson to act as the agent of the parties aforesaid, in all the matters aforesaid, by the permission and under the control, if need be, of the said trustee, and to change, and from time to time alter the said

securities, as occasion may require, and take new securities in their stead, so as that the fund as aforesaid settled shall always be kept good. And it is also hereby further agreed and covenanted by and between all the said parties, that the said trustee shall not be held guilty of breach of trust, although he does not act personally in the premises, unless he be expressly desired and requested so to do by one of the other parties hereto, or those claiming under them; and that he shall not in any manner be held liable as trustee, unless for acts of wilful neglect or misconduct."

The plaintiffs and the defendant were merchants residing in Canton, in China, previous to the 25th of March 1825, when the defendant returned to the United States, leaving an agent, Rodney Fisher, in Canton, with full powers to transact his business, and to bind him by commercial contracts, and who was introduced to the plaintiffs as his agent by the defendant. Very large loans were made to the agent of the defendant by the plaintiffs, which were employed in loading the vessels of Edward Thompson; the goods being pledged to pay the loans at Philadelphia, and the shipments so made being for the use of Edward Thompson. Edward Thompson was without credit or friends in Canton, and the credit of his son John R. Thompson was thus employed by his agent to load the ships; the defendant's compensation consisting of the commissions on the transactions.

On the 22d of November 1825, Mr Fisher, as the agent of the defendant, borrowed of the plaintiffs thirty thousand dollars on the pledge of an invoice of goods valued at about forty-two thousand dollars; and on the 2d of December 1825, thirty-three thousand dollars more were borrowed on the pledge of another invoice valued at upwards of forty-four thousand dollars, together exceeding more than sixty-three thousand dollars on pledges of goods exceeding, in invoice amount, eighty-six thousand dollars.

Besides these loans, the defendant obtained others in China, where he also owed some other debts, inconsiderable in amount, and after his return home, he signed his father's respondentia bonds for two hundred thousand dollars. On all these loans and respondentia, there were large sums lost: the goods pledged

to the plaintiffs did not sell for half the invoice prices; and the defendant lost moreover upwards of twenty thousand dollars by his father's failure. He was not possessed of any real estate, mortgages, public stock or other productive property; and whatever he was worth, if any thing, was involved in his father's affairs.

On the 19th of November 1825, Edward Thompson's insolvency was made public. On the 19th of December 1825, the defendant, having arrived from Canton in this country on the 1st of June of that year, and soon after made an engagement to be married with Annis, the daughter of Richard Stockton, Esq., submitted a statement of his affairs to Mr Stockton, with a view to the marriage settlement before stated, which was executed the same day.

Statement by John R. Thompson, made previous to settlement:

"I have no personal debts except to a small amount, in common course of business and living. I am surety for my father in a respondentia bond to Messrs Schott and Lippincott, in a penal sum of two hundred thousand dollars. If the goods which are pledged sell reasonably well, there can be no loss; for the freight on these goods, the commissions in China, and the premium on dollars on the outward investment, all tend to enhance the security; and such is the opinion of Mr Schott expressed to me in a conversation on this subject; there can, therefore, be no demand on me.

"Upon no fair principle of calculation could the loss, if it should happen, be more than twenty thousand dollars, and I consider myself worth that amount, if not more, in addition to the sum proposed to be settled.

"JOHN R. THOMPSON.

"*December* 19, 1825."

Indorsed by Richard Stockton, "Statement made to the trustee by J. R. Thompson as the basis of the settlement, and upon which it was made.

"R. S."

The marriage took place the 28th December 1825. But during the life of Richard Stockton, the settlement was never acknowledged or registered, nor has the forty thousand dollars

in productive stock, ever been provided, as the settlement stipulated, by the defendant, who pleads inability to do so, from insolvency. After Mr Stockton's death, and shortly before judgment confessed by the defendant, for the balance remaining due to the plaintiffs, the defendant delivered to Robert Stockton, the eldest son of Richard Stockton, deceased, two promissory notes, together, for nine thousand five hundred dollars, one of which, for four thousand five hundred dollars, is of doubtful worth.

Of the sixty thousand dollars and upwards, due by the defendant to the plaintiffs, a principal sum of about twelve thousand dollars remaining due. Suits were brought for the same against him in Pennsylvania, where he resided, and in New Jersey, where he settled at the time of his marriage, in both of which suits judgments were confessed for the sum claimed.

On the 3d of June 1830, the following agreements relative to the case were entered into by the counsel for the plaintiffs and for the defendant.

Whereas the above named plaintiffs did recover, on the 26th day of November 1827, against the said John R. Thompson, the sum of twenty thousand nine hundred and twenty-nine dollars and seven cents damages, besides costs of suit; and whereas the said plaintiffs allege that the said John R. Thompson has the means of satisfying said judgment and costs, and the said John R. Thompson denies his ability to pay the same, and requires that the proof thereof may be tried by a jury, and an issue for the trial thereof has been agreed upon between the parties, in the circuit court of the United States for the eastern district of Pennsylvania, to April sessions 1830; it is hereby ordered and agreed, that the action as above stated be entered, and that the said John R. Thompson cause an appearance to be entered for him to the same, and that said plaintiffs declare of the said term of a discourse had and moved between the said plaintiffs and the said defendant, of and concerning whether the said defendant has the means, by the property in his marriage settlement or otherwise, of satisfying the judgment aforesaid; and that the said defendant, in consideration of a mutual promise on the part of the said plaintiffs to him made, did promise to pay to the said plaintiffs the sum of twenty-five

thousand dollars, in case he, the said defendant, has the means or ability of satisfying the judgment aforesaid, so that this said issue may be tried by the country. And it is further ordered and agreed, that the circumstances of the said mutual promises, and of the affirmations and assertions laid in the declaration shall be confessed, so that the said issue may be tried on the merits, and that the costs of the suit shall follow the verdict; but that the said verdict shall give no title to either party to recover from the other the sum laid in the declaration. The merits to be tried without regard to form, and either party to be at liberty, under the direction of the court, to modify or change the pleadings so as to facilitate such trial on the merits."

"Whereas a feigned issue has been agreed upon between the parties in this case, for the purpose of ascertaining by law whether the defendant, John R. Thompson, has the means, by the property in his marriage settlement, or otherwise, of satisfying the judgment recovered against him in this court to October sessions 1826, No. 18; now, it is hereby agreed to be the understanding of the parties to this suit, that if the plaintiffs recover, that the liability of the security from said defendant shall be to the extent of the property actually settled by said defendant on his then intended wife, by virtue of a marriage settlement, dated the —— day of December 1825.

"And if judgment shall be for the defendant, that the said property contained in said settlement shall be entirely discharged, and the security entered as above stated entirely at an end; either party to be at liberty to carry the case, according to established regulations, to the supreme court of the United States for determination."

The case was tried at the April term of the circuit court in 1831, under these agreements, and a verdict under the charge of the court, was rendered for the defendant. The plaintiffs excepted to this charge and prosecuted this writ of error. The whole of the charge of the court was inserted in the bill of exceptions, and brought up with the record.

The facts of the case as made out in evidence, according to the views of the court, are stated particularly in the charge to the jury.

The charge was as follows:

"The nominal parties are the plaintiffs and the defendant. The real parties are the plaintiffs and the defendant's wife.

"The nominal question is whether the defendant has any property. The real question is whether the property he owned in December 1825, passed to Richard Stockton, father and trustee of Mrs Thompson, for her use, or whether it remained in the defendant on account of the legal inefficacy of the marriage agreement to divest him of it, and vest it according to that agreement. If it was operative in law, the house furniture and fund in hands of Robert Stockton belong to him in trust for the uses of the agreement.

"If not, then the law deems J. R. Thompson to be the legal owner in trust for his creditors, of whom the plaintiffs seem to be the only ones.

"He remains the owner, not because the agreement is not binding on him, but because, under the circumstances of the case, his indebtedness to the plaintiffs put it out of his power to so divest himself of it as to prevent his creditors from considering it his so far as to be a fund for the payment of their debt, and this is the only question we have to settle. From the evidence, the plaintiffs' debt is a fair and valid one, as between them and defendant; between him and Mr Fisher it is not our province to inquire; that depends, perhaps, on the evidence of authority which the latter can produce; but his evidence is sufficient for the plaintiffs to show a debt existing at the time of the marriage agreement. The judgments confessed by Thompson are evidence not only against him, but as they may affect the interest of his wife in the property in question, to show the indebtedness of Thompson at the time of the agreement. (Hinde v. Longworth, 11 Wheat. 210.) Taking the judgment in connexion with the testimony of Mr Fisher, you will probably think the plaintiffs' case so far made out as to establish the existence of a valid legal debt due plaintiffs by defendant at the time of the marriage settlement, and no evidence being given to impeach the claim, we think, in point of law, it is so, unless you feel at liberty to discredit Mr Fisher; though Mrs Thompson is no party to the judgment, it is evidence to affect her claim.

"This brings us to the main question of the validity of the marriage settlement, on which the cause must turn.

"It is good between the parties, and good as to all the world, unless it is liable to impeachment for fraud; which is of two kinds, fraud in fact, and fraud in law.

"The first is an intention or design to defraud, delay, injure or prevent creditors from receiving their just debts, by a sale, deed, settlement or agreement, by which the property of a debtor is withdrawn, or attempted to be withdrawn, from their reach. The English statute of 13 Eliz. declares all such acts null and void as to creditors; this statute is in force here, and you will consider it as having the same effect in this cause as a law of New Jersey; the common law makes the same declaration, and if the evidence brings this case within it, your verdict must be for the plaintiff. Proof of fraud may be made out by direct evidence, or may be inferred from such circumstances as will justify that inference; but a jury ought never to presume it without either; you ought to be satisfied that the facts before you indicate and reasonably prove the existence of that dishonest fraudulent intention, which brings the case within the true spirit and meaning of the law. A mere doubt or suspicion of the fairness of the transaction ought not to be sufficient to lead to the finding of any act to be fraudulent, unless the conduct and situation of the parties, and the effects intended to be produced by the act, appear inconsistent with their integrity, and admit of no reasonable interpretation but meditated fraud, to be effected by the agreement, sale or deed; on this subject the law does not remain to be settled by this court; it is laid down by Judge Washington, and adopted by the supreme court in the case of Conard v. Nicholls, 4 Peters, 295, 296, 297, and must be considered as binding on court and jury in deciding on this part of the case.

"To taint a transaction with fraud, both parties must concur in the illegal design; it is not enough to prove fraud in the debtor; he may lawfully sell his property with the direct intention of defrauding his creditors, or prefer one creditor to another; but unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is

valid against other creditors or purchasers who may be injured by the transaction. The declarations or admissions of the debtor, as to the object intended to be effected, are evidence to contradict his answer to a bill in chancery, brought to annul the act alleged to be fraudulent, but not to defeat the title of the grantee or person claiming under it, or to have a bearing on the whole case. 2 Peters, 119, 120; Venable et al. v. Bank of the United States, 2 Halst. 173, 174, S. P. Before you can pronounce this marriage agreement void and inoperative, on the ground of actual fraud, you must be satisfied not only that the defendant made it with design to defraud his creditors, but also that Mrs Thompson, and her father and trustee, Mr Richard Stockton, participated and concurred in the fraud intended; if they were innocent of the combination, it would be harsh and cruel in the extreme to visit on her the serious consequences of her intended husband's acts, and as inconsistent with law as justice.

"The facts of the case are neither complicated or contradictory; affording evidence much more clear and satisfactory than usually appears in such cases; it appears that John R. Thompsor, after residing some time in Canton, left it in March 1825, and returned to this place in June following; that he paid his addresses to Miss Stockton during the summer, contracted an engagement of marriage with her, and contemplated making a settlement upon her as early as September. That the marriage articles were executed on the 19th December, and the marriage solemnized a few days afterwards, or perhaps sooner; he built a house on the lot mentioned in the agreement at an expense of thirteen thousand dollars, furnished it at the expense of five thousand dollars, but invested no part of the forty thousand dollars during the lifetime of Mr Stockton. In September 1829, he put into the hands of Captain Robert Stockton, who succeeded his father in the trust, securities to the amount of nine thousand five hundred dollars, on account of the sum to be invested pursuant to the settlement. From the evidence of Mr Fisher and Mr Mackie, it appears that Mr Thompson was worth, say in December 1825, about eighty or ninety thousand dollars in money and personal property, and

owed seventy thousand five hundred dollars, of which seven thousand five hundred dollars were on his own account due in Canton, and paid by Mr Fisher. The residue was the sixty-three thousand dollars borrowed by Mr Fisher on the 22d November and the 2d December 1825, from the plaintiffs on the credit and on the alleged authority of Mr Thompson, but entirely for the use of his father, Edward Thompson, in order to complete the cargoes of his ships then at Canton short of funds. We have no evidence of any other debts which would materially diminish the sum which he was estimated to be worth. This large debt was contracted, not by any specific, but general directions or orders; it was unknown to him till the spring of 1826 that such a debt existed, and therefore could not have been in his contemplation when the marriage articles were executed; they could not have been entered into for the purpose of defrauding the plaintiffs, and he appears to have had no other creditors unless those who were paid by Mr Fisher, in Canton, out of Thompson's funds in his hands. The security given to the plaintiffs exceeded the amount of the respondentia bond twenty-three thousand three hundred dollars, which may fairly be presumed to have been invested in the invoices pledged to the plaintiffs out of his own funds, as there is no evidence that this sum was raised by loan on the goods purchased on credit. This added to the other debts, amounting to seven thousand five hundred and forty-eight dollars, makes thirty thousand seven hundred and forty-eight dollars, which would seem to have been raised without contracting a debt. Defendant pledged twenty-three thousand three hundred dollars of this to secure the plaintiffs for a loan made for the use of Edward Thompson, and made Thompson personally liable in the bond. If the contracting a debt in this manner, by which there could be no profit but commission, and might be attended with heavy loss, was intentional fraud, then you will judge whom it could have been intended to defraud, Magniac or Thompson; if there was any part of the debt lost, it must fall on the latter; the former could not suffer unless the proceeds of the two invoices produced less than sixty-three thousand dollars, and Thompson became insolvent; if, under such circumstances, you find that there was meditated fraud, it will

be hard to discover a motive which could operate on the mind of the defendant to his own benefit, or injury of the plaintiffs.

"This debt not being contracted personally by Mr Thompson or his special directions, it would be difficult to infer any fraud in him in borrowing the money, and still more so in his agent, Mr Fisher; it cannot well be doubted that it was the intention of the one, in conferring the authority, and of the other, in executing it, to comply with every stipulation for repayment, or that in entering into this agreement of marriage, all parties were ignorant of the existence of the debt. The mortgages of the invoices of eighty-six thousand dollars for security, is most powerful evidence to negative fraud of any kind; these are the most material, and probably all the facts of the case, necessary for your consideration of the question of fraud in fact; you will apply the law as read and stated to you to the evidence, and decide according to your convictions of the justice of the case. As a question of fact, it is for your exclusive decision; the court, however, think proper to say, that in their opinion, an inference of intentional fraud would be a very severe comment on the conduct of the parties.

"If, however, you should be of opinion that there was such fraud attending this transaction as brings it within the legal principles laid down for your guide, you will find accordingly a verdict for the plaintiffs.

"Another part of the issue which you are to decide is, whether the defendant has concealed, and has in his possession, disposal or command, any part of the property he owned in 1825, amounting to eighty or ninety thousand dollars, which has been accounted for as by statement of Mr Fisher and Mackie, leaving the sum of twenty-five or twenty-six thousand dollars, which has been shown to be invested in the house furniture and securities in the hands of captain Stockton; connecting this with the evidence of Mr Norris, you will be able to decide whether defendant has any means of paying the plaintiffs' debt, of which he has not given an account, or which remain in his hands.

"In tracing through the evidence the conduct of the defendant towards the plaintiffs in relation to this debt, you will discriminate between the deliberate design to defraud by secreting pro-

perty for his own use, and losses incurred by casualties and want of prudence or discretion; on this part of the issue you are to inquire only as to the property which he actually has in his possession or control, not into what he ought to have had, or what he has disposed of for any other use than his own; and will not take into consideration what has been expended or applied towards the marriage contract, that being the subject of the first inquiry, which is altogether distinct from this.

"The next and most important question is, whether the marriage contract is fraudulent in law, and for that reason void as against the plaintiffs; that is, although the intention of the parties was fair and honest, and the act done without any design to defraud, the policy of the law forbids its execution, and takes from it all legal efficacy as to the creditors of John R. Thompson. The deeds, gifts, grants or other contracts, which the law avoids, are those made with intent to defraud, hinder, delay or injure creditors; and in order to avoid them, both the party giving, and the party receiving, must be participating in the fraud. On this subject, the law is written and cannot be misunderstood. The sixth section of statute Eliz. ch. 13, provides that the act shall not extend to any interest in lands or goods and chattels made on good consideration, bona fide lawfully conveyed or assured to any person not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such fraud, covin or collusion.

"The words of the law require that both parties must concur in the fraud, in order to bring the case within its provisions, and such has been its settled judicial exposition for two hundred and sixty years.

"There are in law two kinds of considerations; good, which is natural love and affection; and valuable, which is money or marriage. The word good is used in this law as applied to cases which it does not mean to embrace; but from the evident meaning and object of the law, to protect creditors from the disposition by debtors of their property with intent to defraud them, and from dispositions which might produce that effect by conveying it to their wives, children, relations or friends; all courts, both of law and equity, have considered the word good as meaning valuable consideration.

"You will perceive that the law, as thus expounded, embraces three kinds of conveyances:

"1. Those made with the intention in both parties to defraud creditors; these are void, whether made with or without consideration, good or valuable, not only on account of the covin or collusion, but as exempted from the saving of the sixth section, not being bona fide.

"2. Voluntary, made for good consideration, but tending to defraud creditors; if they are permitted to have a legal operation to vest the property conveyed, the policy of the law makes them void for legal fraud—though there is no fraud in fact, the fraud in law being deemed equivalent to it.

"3. For valuable consideration, in good faith, without notice by the person receiving the conveyance of any fraud, covin or collusion by the grantor to defraud his creditors; these are excepted from the operation of the law before referred to; they are good and valid at common law to pass the property conveyed, and purchasers under such conveyances are entitled to, and receive the protection of all courts of justice. From what has already been given you in charge on the subject of actual fraud, you will be enabled to decide whether this case comes within the first class of cases of intentional fraud in both parties to the marriage contract; if you are not satisfied that this contract is of this character, then it cannot fall within the second class of voluntary conveyances. If it was made in contemplation of marriage, it was made on a valuable consideration, and puts the intended wife on the footing of a purchaser for money, and not of a voluntary grantee or donee for the mere consideration of love and affection. She is not to be considered in any court as a volunteer, but comes into court at least on an equality, both in law and equity, with any other parties whose claims are founded in money. You will not forget the difference between a provision for a wife and children before and after marriage; when there is no portion or money paid, it is the difference between a purchaser and a volunteer, for the former the consideration is as valuable as the debt due a creditor, or the money received from a purchaser in the latter; it is, from its nature, merely voluntary; there can be no other than a good consideration for making it; there

exists, it is true, a moral obligation to provide for their support and comfort, but that moral obligation must yield to the legal one, which every man must observe towards those who have just claims on his property. In dispositions of property which take effect in the disposer's lifetime, as well as after his death, there is a golden rule which applies to all—a man must be just before he is generous; this applies to all cases between volunteers or those claiming merely by a voluntary disposition, made by deed or will to those who have no legal claims on the person who makes it on the one hand, and creditors and purchasers on the other. But where conflicting claims between creditor and creditor, purchaser and purchaser, or purchaser and creditor, arise in court, they are settled by other rules. The first inquiry as to them is, whether one class has a legal right to the debt claimed, or the other to the thing claimed to be purchased, such as is recognized in a court of law; the second is, whether that right has been so acquired as to be attended with such circumstances of fraud, accident, mistake, trust, inadequacy of price, or unfairness, as will annul or modify it in a court of chancery, according to the established principles of courts of equity.

"Creditors have, as between them and the debtor, an undoubted right to so much of his estate as will pay their debts; but the debtor has a right, equally undoubted, of preferring one creditor to another, or giving all his property to one; this is neither fraud in law or fact in the absence of covin or collusion. A debtor may sell his whole estate, turn it into money, and distribute it among his creditors at his pleasure; those only who have liens on it, can, in either case, have any resort to the property in the hands of a bona fide purchaser or creditor, who has fairly received it in payment of his debts. These are known principles of law, long settled and established by universal consent and adoption in our system of jurisprudence; they form rules of property and title on which the peace of society and security of rights essentially depend; they cannot be shaken by courts or juries without producing endless confusion, uncertainty, and want of confidence in the administration of the laws of the land.

"We will then apply them to the case under our considera-

tion, in order to ascertain, by their bearing on its merits whether it comes within the third class of cases, which, we have seen, are excepted from the provisions of the statute.

"A contract in consideration of a future marriage, is of that nature which creates a legal and equitable obligation on the parties to perform it, in good faith, according to its stipulations; the consideration is good and valuable in contemplation of the law, as if it was made on the loan or payment of money; if the contract is executed, the parties become purchasers; if it remains executory till after the marriage, they become creditors on its consummation, or assume pro tanto the character and acquire the rights of both, if executed only in part. They are entitled to the protection of all courts in the enjoyment of what is granted, and to their aid in enforcing the performance of what has been stipulated to be done, and where either party can rightfully call on a court of law or equity to compel the other to perform an act necessary to the execution of the contract, and the judgment or decree of the court would be given in his favour, a voluntary performance of the legal or equitable obligation would be equally valid. The consideration being valuable if the contract, whether executed or executory, is made in good faith with one having no notice or knowledge of any fraud, covin, or collusion to defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in the whole or in part, as is in the power of the party; and whatever is so done, will be as valid and binding between the parties and in relation to third persons, as if the execution had been completed on its date. The law is express in referring to the time of the conveyance and assurance, and embraces not only perfect grants or gifts, but any estate or interest in lands, goods and chattels, made, conveyed or assured. On these principles it is the opinion of the court, that the evidence in this case brings the marriage contract within the sixth section of the law, excepting it from the operation of the first section, unless you shall find that it was made, not bona fide, or with notice or knowledge of a fraud in John R. Thompson in entering into it, brought home to his intended wife, and that Thompson actually entered into it with such fraudulent, covinous or collusive intention.

"If you do not find such want of good faith or existence of notice, then Mr Richard Stockton must be considered at law as a purchaser for valuable consideration, bona fide, and without notice, so far as the contract has at any time been proved to have been executed by Thompson, and his creditor, so far as remains to be executed, and Mrs Thompson as having the same character in equity, and captain Stockton as invested with all the rights and standing, in all respects, in the situation of his father.

"The aspect in which these considerations present the case, is a contest between Mr Stockton and Mrs Thompson, the one the legal, and the other the equitable purchaser of the house, furniture and securities from John R. Thompson, by the contract and in consideration of the marriage, and the lot as the marriage portion, and the plaintiffs, his sole creditor. Thus they stood at the commencement of this suit, and as creditor at the time of the contract and consummation of the marriage, they having performed their stipulation, had a perfect right to call on Thompson, both at law and equity, to perform his. If Mrs Stockton is a purchaser, she is one of the most favoured class; the consideration she has given is as valuable and as much to be valued as money; it is not necessary to consider it as more so; if she is invested with the acknowledged rights of a money purchaser, a conveyance of real or personal property made to her before marriage, by her intended husband, of real or personal estate, would be as valid and effectual although he was in debt as if he was not. If he had the legal title to the thing conveyed and power to sell, the interest and beneficial use would vest in her and her trustee, by the deed, as fully and completely, if the property had been held in trust for others, as if Thompson had a right as perfect in equity as at law, provided she had no notice of the trust. This is a universal principle never questioned, and protects all bona fide purchasers for valuable consideration without notice, before the money paid or the condition of the grant performed.

"The application of this well known and acknowledged rule of law to Mrs Thompson does not make her a prerogative or a privileged purchaser; it only puts her on the footing of every other purchaser, from one who has the legal title, subject to

an unknown trust, for the use of a third person. This case is of the strongest kind against the cestui que trust, if the plaintiffs can be so considered, and they cannot be placed in any attitude which can give them better rights than in that, for the debt was contracted with them but a few days before the date of the marriage articles, and in a quarter of the world so distant as to preclude the possibility of notice to other parties. In the common case of a trustee, conveying the legal estate to the injury of cestui que trust, the trust exists at the time of the conveyance, it is necessarily known to the trustee, and notice may be brought home to the purchaser by direct or circumstantial evidence, as in all other cases; but in this it could be done by no possibility.

"When the law is so well settled, as in the case of a conveyance by a trustee to one having no notice of the trust, it can have no effect to urge any arguments of hardship on the person injured; we could not change the law on the subject if we would, and should violate our duty not to so declare it. It is a hardship on a widow or an orphan who has been defrauded by her trustee, in selling what is not his own, but theirs; but it is great, if not a greater hardship on the widow or orphan to be deprived of property which they have purchased and paid for by money earned by their industry, and deprived of that on the faith of which they have devoted their lives to a husband, and placed at his disposal their future happiness and last cent. A loss must fall on one of two innocent sufferers, whose claims may be supposed equal in justice and equity; in such case the law leaves the property with the one who has acquired the legal title by fair purchase in good faith and without notice; and a creditor of a fraudulent debtor, who sells or settles on his intended wife property which he is bound both in law and equity to apply to pay his debts, can on no principle be more favoured in any court than the person whose property is unjustly conveyed by a trustee to pay his own debts, to rob one family in order to save another, or secure a provision for an expected one of his own. A creditor is no where more favoured than the infant, the ward, the widow or orphan, whose property is in the hands of trustees, without lien or security, and subject to his disposition by deed or bill of sale.

"The creditor of a deceased debtor has the same right to the payment of his debt out of his property as a living one; yet a sale of the personal property of a deceased, by an executor, administrator or trustee, to pay his own debt, is good against creditors, the widow and next of kin, if made without notice or collusion, and no court of chancery will annul it; yet it is as much a breach of faith, as deep a violation of moral honesty, as to settle the same property on an intended wife, to whom he was under as high and imposing obligations to perform his contract of marriage, by paying the promised consideration on which it was solemnized, as to discharge a bond given for money lent or property purchased.

"These are general principles and rules of law which, we feel confident, are the pre-existing law of this case, and, as such, lay them down to you as the legal rule for your verdict; we should *make*, instead of expounding the law, act as legislators of new rules, and not as judges, expositors and administrators of old and well established ones, in declaring that Mrs Thompson is, in this case, to be viewed in a less favoured light than a purchaser in consideration of money or property.

"The consideration of the contract on which this cause depends, is both marriage and property; the value of the one cannot be, and the other has not been ascertained in dollars, but we think the justice of this case can be attained without doing either; considered as a purchase made in good faith, and the purchase money paid without notice of any fraud by the intended husband, we know of no principle by which it can be declared void in a court of law; we know of no case in which a conveyance of real or personal property so made, has ever been, or, agreeably to legal principles, could be annulled and set aside on any reason founded on mere inadequacy of consideration. All that is required to render a conveyance valid at law in that respect is, that there be some consideration, the amount is not material, and cannot be inquired into either as respects the grantor, his creditors, or subsequent purchasers of the same property, in the absence of actual and legal fraud in the grantor, or notice of it to the grantee. The only resort of the parties who complain of any equitable fraud, or other circumstances which would invali-

date it in equity, is to those courts, they only can decide upon the inadequacy of a pecuniary fund, or the equality of marriage to a given sum of money, or value in property, under the circumstances of the case. Cases may exist in which a court of chancery would compare and estimate them, for the relief of a creditor, a purchaser, or perhaps the party, in a strong and clear case of injustice; when such a case occurs it will be time to give an opinion on it; as yet we know of no instance in which a court of chancery have set aside a purchase for a valuable consideration, or a marriage contract, when made bona fide, and without notice of fraud or defect of title; those claiming under them have ever been the peculiar favourites of such courts, and their rights can never be disturbed, unless in some extreme case of such a nature as to call for the application of old rules and principles to a new state of facts, which have never yet been presented to a chancellor. Truth is not to be elicited by forced comparisons and extravagant suppositions, or extracted from extreme cases of rare and barely possible occurrence; the rules of law have been settled to meet the common and ordinary occurrences of life, which come within the cognisance of courts of justice; extreme cases may arise, and though necessity may have no law, yet there are rules for all exigences, but they are only to be applied when they arise; they differ much from those which regulate and govern the ordinary common contracts of society. The court perceives nothing in the one now under our examination, which gives it any unusual features. At the time it was entered into, if you view the evidence as we do, Mr Thompson, so far as he could judge, was abundantly able to make the stipulated provisions for his intended wife, without doing any injury to the plaintiffs or any other person; he has given evidence of losses enough to account for his inability to comply either with his contract with his wife or plaintiffs, but they were unforeseen at the time; they happened not by his dishonesty or even imprudence. An investment was made by his agent without his knowledge; the money was borrowed; the purchase and shipment made by Mr Fisher, in good faith, and in the exercise of sound discretion. But what cost eighty-six thousand three hundred dollars in Canton, produced less or

not more than forty thousand dollars in Philadelphia; it has been a calamity by which the defendant has suffered and must suffer; his wife must lose thirty thousand dollars of her settlement, or the plaintiff lose twelve thousand dollars of his debt; even admitting their equities to be equal, she has a legal advantage which no court can take from her, unless her conduct can be impeached for actual or legal fraud; it would be as unjust as illegal and inequitable, to visit alone on her the misfortunes which attended her husband's affairs. Considering Mrs Thompson then as a purchaser under the marriage articles, we are decidedly of opinion, that there is no legal fraud attending the transaction which would invalidate it in a court of law, or any matter given in evidence which would impair its obligation in a court of equity; the nature of the issue seems to us to require both views to be taken. If Mrs Thompson cannot be viewed as the purchaser of the property contracted to be invested for her use, she is certainly a fair and honest creditor from the time of its execution, if not from the time of the proposed settlement in August, after the engagement of marriage was made; if she was a creditor on the 19th December, Thompson had a right to prefer her in preference to any other creditor to the extent of his whole property, whenever he could realise or reduce it into possession. The mere priority of the plaintiff's debt, in point of time, gave him no such legal or equitable priority of payment as to prevent the marriage agreement from having a legal efficacy on the parties; though Mr Fisher had a previous authority to contract it, it could not cut out the inchoate rights of Mrs Thompson, by the engagement and proposed settlement in the summer of 1825, which, you may fairly infer from the agreement, was in the course of execution, by Thompson having begun to build a house on the lot of which Mr Stockton was to stand seised in trust before the date of the articles; and the deposition of Captain Stockton is, that it was built in 1825 and 1826. These circumstances may be thrown out of view on both sides, and the rights of the respective parties be tested at the time of the consummation of their respective contracts; that of the plaintiffs on 22d November and 2d December, and Mrs Thompson's on the 19th; if they were both fair creditors, Mr

Thompson had a clear undoubted right to prefer either, and pay the whole debt out of any property on which the other had no lien; and we are of opinion, that she might be considered as a fair creditor to the amount of the promised settlement, made under circumstances which, we think, wholly insufficient to justify its being rescinded, in whole or in part, in a court of law or chancery, unless it was attended with actual fraud. If it had comprehended his whole estate, and the certain consequence of being carried into effect, or the intention of the parties had been to exclude the plaintiff from the payment of his debts under cover of the agreement, on the equity side of the court we would give him relief. But this case seems to us to have no such character; the intervention of unexpected losses alone, and neither the effect of the agreement or the intention of the parties have produced the existing state of things, which, if not changed by your verdict, and our judgment, will leave the parties thus. The plaintiff's debt was nominally sixty-three thousand dollars; the sum actually received by Mr Fisher sixty-one thou and and two dollars, bearing an interest of per cent, of which he has received all now due, principal and interest, except about twelve thousand dollars; that of Mrs Thompson, estimating the house and furniture at eighteen thousand dollars, amounts to fifty-eight thousand dollars, of which there is yet due thirty-five thousand dollars, if Morris's debt is not good, or thirty thousand five hundred dollars if it is good, besides interest from December 1825. Though this, in equality of loss, might and would not be of any importance to her in a court of law, it would be a powerful circumstance in a court of equity, to which the plaintiff would apply for relief from alleged hardship. The time at which the contract was made, and the circumstances then attending it, connected with the situation of the parties at that time, furnish the proper criterion by which to ascertain their respective rights; if they have changed by events happening since, and are to be governed by their situation at the commencement of the suit, it is important to view the change of the marriage contract. Instead of withdrawing the forty thousand dollars, to be invested for the use of Mrs Thompson, it has been reduced to five thousand dollars certain, or nine thousand five hundred dollars con-

tingent; had this been the original stipulation, it would hardly have been deemed an unreasonable or disproportionate consideration for the marriage; of the sum promised, and interest, she will in no event receive more than one fifth, and possibly only one tenth from the wreck of Mr Thompson's property, while the plaintiff has received more than the half of what remained due him, after deducting the proceeds of the two invoices, of which no part went to Thompson or his wife, but the whole was applied to the plaintiff. It is also an important matter, as it affects the character of the two contracts at the time they were made, that Thompson gave no security, and pledged no specific fund for the investment of forty thousand dollars, but as security for the repayment of an actual loan of sixty-one thousand and two dollars, the plaintiff received as security goods of which the prime cost was eighty-six thousand three hundred dollars.

"This view of the merits of this cause seems to the court to be sufficient for the decision of the points directly at issue; others have been made, and ably argued by counsel on both sides, but we are not disposed to trouble you with a discussion not necessary to a correct decision of the question between the parties. The cause has been tedious, and its examination sufficiently laborious; we shall not, therefore, investigate the doctrine of voluntary conveyances or contracts of marriage made after it has been consummated, they not partaking of the character of purchases in consideration of money or marriage. In the first class of cases, the existence of debts due by the grantor at the time of the deed or contract, has a very important, if not decisive bearing on their validity, as to creditors; the law is not clearly settled, so as to their effect on subsequent purchasers. But it has never been decided that a deed conveying to a bona fide purchaser, or an intended wife, is in any manner impaired by the mere existence of pre-existing debts, and to this class of cases alone it is necessary for you or the court to direct their attention.

"The rules which we have expounded to you, as controlling this cause, are such as are founded on principles which are assented to by counsel on both sides, they differing only in their application; there can, indeed, be no other question, if

Mrs Thompson is to be considered as a fair purchaser without notice, or an honest creditor; her claims can only be affected by fraud in a court of law, or such a case of equitable jurisdiction as could induce a court to annul a conveyance, made in consideration of money, or as security for a debt, or enjoin the assertion of any right accruing or claiming under it. The importance of the principle involved in this controversy, made it our duty to examine it at large, and as the sum in dispute authorizes either party to take the cause to the supreme court for revision, we have given an opinion explicitly, so that the law may be fairly settled. We conclude, then, with instructing you that a settlement made before marriage, makes the intended wife a purchaser; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was bona fide and without notice or fraud. The plaintiffs have made an objection to the operation of this deed for the want of evidence of delivery; this is a question for you to decide; the evidence is sufficient to prove it, if you believe the witnesses; the building and furnishing the house are facts tending very strongly to prove the delivery in a satisfactory manner; the law on this subject is well settled by the supreme court, in Carver v. Astor, 4 Peters, 23, 28, 32. You will apply it to this case.

"It has been said that the contract of settlement has been abandoned; it is not to be presumed, and we think the facts given in evidence do not amount to it; every act contemplated to be done by either party, has been performed, except making up the investment; the omission to complete it is not in itself sufficient to authorise you to find that the whole contract has been rescinded; so far as it has been executed, it is not open to any presumption of the kind, and the allegation of abandonment seems to be inconsistent with the charge of alleged fraudulent intention to defraud the plaintiffs. You may find, if you are satisfied with the fact, that the payment of the balance of the forty thousand dollars has been waived by consent of the parties, but this can have no effect on the investment actually made. The non-delivery of the securities for the nine thousand five hundred dollars, till near the time when judg-

ment was rendered in New Jersey, and the omission to record the marriage articles, have been relied on in aid of the presumption of abandonment; but under the circumstances of the case, we do not think they conduce to prove it, (the case last referred to seems to settle this point, 4 Peters, 24, 98, 99) and nothing appears from which an inference can be drawn that Mrs Thompson, for whose benefit this contract was made, has done or consented to any act which could impair her rights under it; the omissions of her trustee to enforce the payment of the money, or to record the deed, cannot be deemed a waiver by her. If the trustee had done any acts inconsistent with the agreement, it could not affect the legal validity of her rights, and the acts of a parent will not be construed to be so unless clearly intended. 4 Peters, 93, 95.

"The court have been requested to charge you, that in point of law, the covenant on the part of Mr Richard Stockton to stand seised to uses, operated as an immediate conveyance to his daughter before marriage, and that by the marriage, Thompson became the owner of the furniture in his own right, and had the exclusive use of the house and lot unincumbered with the trusts of the agreement. By the covenant contained in that agreement, Mr Stockton was not to stand seised to the use of his daughter till after the marriage; if it is the understanding of the plaintiff's counsel that there is any evidence of any other covenant than this, we are unable to perceive it. The deposition of captain Stockton is positive, that his father did not convey, but covenanted to stand seised of said lot (prout deed); this does not even conduce to prove there was any deed independent of the marriage articles, and evidently refers to it, which the court instruct and charge you, as matter of law, does not operate by the statute of uses, 27 Henry 8, to pass the legal estate to the lot or any other property referred to in the agreement to Mrs Thompson or the defendant. It remained in Richard Stockton during his lifetime, devolved by his death on his heir at law, Captain Stockton, and now remains in him on a trust executory; it never was and is not now one executed by that statute. It is unnecessary to explain to you the reasons of this opinion, as it would perplex your consideration of the case with a dry detail of abstruse princi-

ples, neither amusing or instructing to any persons, except those whose professional or judicial duty may lead them to the investigation; as a sheer question of law, you will probably not be disposed to investigate it for yourselves.

"The court are also requested to charge you on three other points of law. 1. That the expenditure of five thousand dollars in furnishing the house is per se fraudulent on creditors; we think not: furniture is part of the marriage contract, to be provided by Thompson in a suitable manner, as he should think fit. He had a discretion which he might exercise in a reasonable manner, according to their station and associations in life, proportioned to the kind of house and extent of income, the trustee or wife could not, in law or equity, compel Thompson to furnish it extravagantly or at useless and wanton expense, and if he should do it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we can say that it is a fraud in law to expend five thousand dollars in furnishing a house costing thirteen thousand dollars, and the establishment to be supported by the income of an investment of forty thousand dollars in productive funds, we must be satisfied that it is, at the first blush, an extravagant and unwarranted expenditure under all the circumstances in evidence, and to an extent indicating some fraudulent or other motive unconnected with the fair execution of the contract, of which we are not satisfied; and therefore cannot charge you as requested by the plaintiff's counsel, there being no clear abuse of the discretion confided by the contract to Mr Thompson. A less expenditure on both house and furniture would have been more prudent and discreet in the situation of the parties in 1826, when the house was finished; something could have been saved for investment if less expense had been incurred, and eight or ten thousand dollars been made productive. Had this been done, there could have been little ground of complaint by a creditor; but as to him it was immaterial how the money was expended; his only concern was in the amount, not the objects of the expenditure, so that they were according to the terms of the agreement; whether a given sum was applied to one object or the other, or fairly proportioned

among them, affected only the parties, not creditors. 2. We are next asked to charge you that the delivery of the notes to captain Stockton, in September 1829, was a fraud; if it was done in order to comply, in part, with the agreement, it was not so; if it was colourable, made with the intention of covering and concealing so much under pretence of the marriage articles for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors, but if delivered with such intention, and not so accepted, then captain Stockton might not only fairly apply it to the trust fund, but was bound to do so. Though it may have been done on the eve of the judgment confessed in New Jersey, that would make no difference, it being to carry into effect the agreement of December 1825; had it been to make a new settlement after marriage, if it was in consideration of a portion or property, it would not have been fraudulent per se; and the time which intervenes between the making provision for a wife, and the contracting the debt or obtaining a judgment against the husband, is not a matter which per se makes it a fraud; it may or may not be suspicious, and connected with other circumstances as evidence of it. 4 Wheat. 506, 507, 508.

"The remaining point on which the charge of the court is requested, is, that the marriage agreement is void, because not recorded within the time required by the law of New Jersey for recording deeds. The covenant to stand seised to the uses declared would come within this law, if the uses were executed by the statute so as to make it an actual conveyance or deed passing the legal estate, but being executory, it is only a covenant giving an equitable estate to those for whom the trust was created and continues, and not a deed. But considering it as a deed, the want of recording does not make it void as between the parties, though it would become void as to the creditors (perhaps) and purchasers from Richard Stockton without notice; but the omission to record it is no fraud on plaintiff, and cannot affect him; not being void as between the parties, it gives to John R. Thompson no other estate or interest but such as arises from the trust; he cannot be entitled to any legal estate or interest under it incompatible with the nature and terms and objects of the trust; our instruction,

therefore, is, that the marriage contract is not void for want of being recorded in time.

"The principles of law which have been thus expounded to you as the guides to your verdict, are all which are deemed by the court of counsel to be applicable to the merits of this case, or necessary to be understood, in order to decide it correctly; they form what, in our judgment, is the pre-existing law of the case, and have been extracted from judicial decisions which afford to our minds conclusive evidence of their wisdom and justice. The rules laid down are not new ones, either here or in that country which is the source of our jurisprudence, and to whose judicial tribunals the wisest and best judges will look without any fear of foreign influence; to some with veneration, and to all with respect, as the expositors of the same common law which originated there, and, adopted in this country, is the source of national pride to both, as a system equally distinguished for its wisdom and public benefits. It has not been thought necessary to cite to you all the particular cases in which judges have established these principles, or refer you to the time of their application, as the nature of the cases decided may have led to their development; this is more proper in courts of error, or in deciding in others, questions referred solely to the court. The course pursued saves you much time, and relieves your minds from much perplexity; it does not produce any injury to the parties; it saves you from a comparison between the character of the courts and judges, who may have given judgments or opinions, settling and declaring the rules of the common law or the construction of statutes. Whether we have, in forming our judgment as to the law of this case, drawn from the old and pure fountains of our jurisprudence, or the muddy rivulets which flow from them, need only be decided by that tribunal to whom none appeal without full confidence that it will in justice give such judgment as will correct all the errors of inferior courts. You will not be willing to confide more in your own judgment to correct any mistakes which this court may have committed in the instructions they have given you, than in that of the supreme court, to whom either party may submit this cause. Let our judgment be what it may as to the law, it can do harm to no one without their sanction; with

their approbation a safe rule of titles and property will be established; your judgment might not lead to one so sound or permanent. Much of what you have heard, has been repeated from the adjudication of that court, much from those of England, their judges and chancellors, whose judgments, decrees and opinions have been carefully reviewed and approved by the pure and eminent jurists who have presided in our own courts. If, in following the path which they have pursued in the administration of justice, this court looks abroad as well as at home for light and knowledge to guide our course of legal investigation, it has been and will continue to be done without the fear of being misled by example, or the self-reproach of adopting in our or inculcating in your minds, principles unsound in law, or dangerous in their moral tendency."

The case was argued by Mr C. J. Ingersoll for the plaintiffs in error, and by Mr Binney for the defendant.

The counsel for the plaintiffs made the following assignment of errors:

The charge of the court instructed the jury that under the circumstances in evidence, the law is against the plaintiffs; that the marriage settlement in question would be valid unless all the parties thereto were guilty of fraud; that marriage is a sufficient consideration for settlement; and left to the jury nothing to find by their verdict, but whether the defendant's wife and father were equally guilty with the defendant in the alleged contrivance to defeat the plaintiffs; arguing, as the charge does throughout, that the verdict should be for the defendant.

He also submitted in argument the following points of law.

1. The settlement covenants that the grantor should furnish the house in a suitable manner as he should judge suitable and proper. As he proved insolvent, and unable to comply with the other terms of the settlement, it was contended for the plaintiffs that five thousand dollars was a fraudulent investment in furniture; on which the jury were to pass their

verdict. The court rejected this view, assumed to determine that the sum was proper, and would not permit the jury to pass upon it.

2. The settlement covenants that the grantor would in the space of one year from the time of the marriage place out on good security, in stock or otherwise, the sum of forty thousand dollars, and hand over the evidences thereof to the trustee. This covenant was never fulfilled. But some years afterwards, when the trustee was dead, on the eve of the judgment confessed by the grantor in New Jersey, he passed over two promissory notes for nine thousand five hundred dollars, together, to the son of the trustee, in performance as was said of the settlement in part. This was contended for the plaintiffs to be fraudulent, and as such to be passed upon by the jury. The court overruled this position, and charged that unless the notes were both delivered by the grantor and *accepted by Robert Stockton*, with fraudulent intentions, the transfer is good.

3. As the deed of settlement was not registered till after the plaintiffs' judgment in Jersey against the defendant, it was insisted for the plaintiffs, that pursuant to the express provision of the statute of New Jersey, in that case, the prior judgment prevails over the subsequent settlement. The statute of uses, 27 Eliz. ch. 10, annexes the possession to the use; the lot and house held by Richard Stockton, in trust for his daughter, became her property, which the husband reduced into his possession; and the plaintiffs' judgment binds it, notwithstanding the subsequent marriage settlement. This was also overruled by the court.

Mr Ingersoll contended:

The plaintiffs are prior creditors. There was no contract for a marriage settlement until a month after the defendant, through his agent, contracted the debt in question to the plaintiffs. The property settled is enough to pay the debt; so that the marriage settlement is the only hindrance, and the question is whether it is an insuperable legal impediment. The philosophy of the law on this subject is simple honesty—to give

every one his own. The English common law, which is our law, differs from the law of all the rest of the civilized world in identifying the wife with the husband. A married woman can own nothing, can lose nothing, can hardly be guilty of a misdemeanour if by construction of law it may be imputed to her husband; whereas in the countries of the civil law, marriage is like a commercial partnership, a firm in which the interests of husband and wife are the same, respecting the joint stock or property. In the great families of England, says Lord Mansfield, it has been found convenient to establish marriage settlements, which luxury and chancery have entrenched behind the principles of the civil law, usurping the free empire of the common law. So long ago as the year 1570, the statute 13 Elizabeth indicates a primitive and proper repugnance to such a contrivance, and endeavours to reinstate the common law, impaired by marriage settlements and other fraudulent conveyances; for which it enacts not only annihilation, but punishment. In defiance however of this resistance of the common law, and the statute law, which is but declaratory of the common law, the English chancellors, who were always interested parties, have built up a system of encroachment and exclusiveness ill suited to American manners, fortunes and institutions. The state of New Jersey by an act of assembly re-enacted the statute of Elizabeth, which itself was but declaratory of the common law, and though American judges are deplorably prone to follow blindly in the ruts of British precedent, yet we may at least claim it as the settled law of this court that we are to be governed by English law before the American revolution, and not to follow them in all the enormities which they are chargeable with since. Cathcart v. Robinson, 5 Peters, 264.

The case of Campion v. Campion, 17 Vez. 262, may be mentioned as one of those strumpet decisions of the modern English chancery which it is to be hoped do not give the law to this country.

The present is the case of a man in trade, with immense outstanding debts and liabilities, without a particle of real estate, or even of personal, but in mere speculation, who im-

mediately after the marriage declared his inability to settle the property promised by the marriage settlement, who has not and never had any goods, stocks, credit, property, or estate of any kind, nothing to pledge even if he wanted to borrow, who pleads utter insolvency, who settled on his marriage the very money he borrowed of the plaintiffs, and who now lives upon it in their despite. Within a month of the crash of his father's immense failure, with whom he was connected in trade, which was an affair of such importance as to be published in the English newspapers, the defendant, by marriage settlement, set apart and now withholds all he could ever claim, and much more than he ever was entitled to.

The question is whether such is a valid marriage settlement. That it hinders the plaintiffs who are prior creditors is beyond all question. In the court below it was insisted for the defendant that by antenuptial settlement the wife is a purchaser, holding by a consideration equivalent if not superior to the most valuable. For the plaintiff, conceding this position, it was contended nevertheless that there must be a fair transaction, as well as a valuable consideration, that fraud will vitiate any contract whatever, that even acquittances, bonds, laws, treaties, may be annulled by fraud, and why not the contract of marriage settlement? The charge sanctioned both these positions; the plaintiffs without reserve, carrying it out in argument ad libitum, and the plaintiffs' position with a qualification which forms the first exception, to wit, that to invalidate a marriage settlement the wife and her father must *combine* with the settlor or husband, and be equally guilty with him of premeditated fraud. The charge is explicit that there must be not only notice or knowledge, or even participation, but combination and premeditation of all together and alike.

This, it is submitted, is not the law. The jury were misled in being so instructed. They should have been advised that they might find fraud in the husband, and knowledge of or notice to the wife or father; and that such a state of things would vitiate the settlement as a fraudulent transaction. The charge considers, first, fraud in fact; secondly, the question of property under the special agreement; and thirdly, fraud in

law, or constructive fraud. The jury supposed, and had reason to suppose, that unless they found the wife and father equally guilty with the husband, they must affirm the marriage settlement as a fair transaction. It even goes so far as to say, in an argument much elaborated to support the settlement, that it would be cruel and harsh in the extreme, and inconsistent with law and justice, to visit the wife with the husband's fraud, unless she concurred in the intention of it, and was guilty of the combination. Now, the law, as expressly enacted by the statute of Elizabeth, and by the act of New Jersey, the common law, the common sense, the obvious morality and reason of the case are, that if either wife or father knew or might have known, or had the least reason to suspect, the husband's fraud, the transaction is altogether fraudulent and void. For it is a question to be determined by the whole transaction, not a part of it. The argument of the charge to the jury puts it to them to ascertain *how much* fraud there was, whereas it is submitted as the law, the reason and the morality of the contested principle, that *any the least particle* of fraud by either party, with any the least notice to the other party, vitiates and annihilates the whole proceeding. The proviso or exception of the sixth section (Atherly, 212) is to except those settlements which are made on good consideration *and* bona fide without any manner of notice or knowledge of the fraud: and so are the authorities. Cadogan v. Kennet, Cowp. 434; Doe v. Rutledge, Cowp. 710; Blanchard v. Ingersoll, 4 Dal. 305; Geiger v. Welsh, 1 Rawle, 353; 1 Roper on Husband and Wife, 298; Dewey v. Baynton, 6 East, 257; Barrow v. Barrow, 2 Dick. 506; Sexton v. Wheaton, 4 Wheat. 507; same case, 8 Wheat. 389; Hinde v. Longworth, 10 Wheat. 213; Johnston v. Harvey, 2 Penn. Rep. 82; Garland v. Rives, 4 Rand. 282; the two last cases are in point.

In all these cases and on all occasions the question was and must be, was it a fair *transaction*, not *how much* fraud was there in it. In postnuptial cases the law infers fraud. In antenuptial cases it is the question to be tried. It is a question of fact, which a court cannot compel a jury to qualify. The morality which pervades all law, and which is the law

itself, prohibits *all* fraud, not merely a *combination* of fraud, and it considers the slightest notice as the fullest participation. Edward Thompson's enormous failure shortly before the settlement, involving John Thompson, must have excited suspicion and inquiry; and the fact is, and such was the plaintiffs' argument on the trial, that Mr Stockton repudiated the settlement, satisfied as he must have become of its invalidity. For the poignancy of the misdirection is that it was a complete surprise: the fact of combination or participation between husband and father never having been suggested or intimated by the plaintiffs' counsel to the jury. On the contrary, their argument was that far from combining, Mr Stockton revolted at the settlement, and refused to complete it. This argument was drawn from the incontrovertible and conclusive facts, that it never was either acknowledged or recorded during his life, but remained a dead letter in family secret, never carried into execution, owing to the settlor's acknowledgement immediately after the marriage that he was unable to set apart the forty thousand dollars stipulated by the settlement to be invested for the use of the wife, or any part of it, being, as he acknowledged, utterly insolvent. Thus his immense debts, large losses, and overwhelming liabilities, becoming known to Mr Stockton immediately after the settlement was signed, and the marriage took place, he did not choose to involve his daughter and himself in the useless odium of such an illegal attempt to deprive creditors of their property. The settlement was therefore cast away, never completed while Mr Stockton lived, never acted upon, and no attempt ever made to realize it, till by the settlor just on the eve of his confession of judgment to the plaintiff, when he had it acknowledged and recorded. All these circumstances the plaintiff had a right to submit to the jury as proof of knowledge or notice, to be inferred, not from participation in the fraud, but repudiation of it. But the court, instead of suffering this view to be presented to the jury for their determination, frustrated it by a misdirection as to combination, which left the jury nothing to find but the fact of combination or a verdict for the defendant.

Even in the definition of fraud the charge misdirected the

jury by a reference to the case of Nicol v. Conard, 4 Peters, 296; where Judge Washington's attention was fixed on the instance of fraud by one with notice to another, not that of fraud by two or more which is defined covin. Co. Litt. 357, b. defines it as referred to by Judge Washington. But both Littleton in the text, and Coke in the commentary, put instances of individual fraud in which two or more are concerned, as contradistinguished from the fraud of combination, or covin. So does Hardwicke in the case of Chesterfield v. Jansen, 2 Ves. Sen. 155. So does Mansfield in the case of Cadogan v. Kennet, Cowp. 43, where the very case is put of a fraudulent conveyance to an innocent trustee. Such are the cases of Garland v. Rives and Johnston v. Harvey before cited. In the case of the Postmaster General v. Reeder, 4 Wash. C. C. Rep. 683, Judge Washington explains his opinion of fraud actual and constructive; and in the case of Gilman v. The North American Land Company, 1 Peter's C. C. Rep. 464, he individuates it. The charge, it is therefore submitted, annuls the whole law of notice as to fraudulent conveyances, and makes every one a fair purchaser who is not a participator in the fraud; so that a wife or father have only to remain wilfully ignorant of a husband's fraud, and a family settlement will be valid of property acquired by highway robbery. On the part of the plaintiff, it is submitted that the principle of law is to be found well expressed in the careful language of the sixth section of the statute of Elizabeth, that entire good faith, besides a valuable consideration, are indispensable to the validity of every marriage settlement.

Exception was also taken to three distinct errors alleged against the charge as follows:

First. The settlement covenants that the grantor should furnish the house in a suitable manner. As he proved insolvent and unable to comply with the other terms of the settlement, it was contended that five thousand dollars was a fraudulent investment in furniture, on which the jury were to pass their verdict. The court overruled this position, would not permit the jury to pass upon it, but assumed to itself the determination that there was no fraud. The case of Cannon

v. Campion, 17 Ves. 262, the authority of which has been denied, sanctions this position of the plaintiffs' counsel, and is authority *a fortiori* when it determines against a family settlement.

Secondly. The settlement covenants that the grantor would in the space of a year place the sum of forty thousand dollars on good security and hand over the evidences thereof to the trustee; which covenant was never fulfilled. But several years afterwards, the trustee having in the meanwhile died without the acknowledgement or registry of the conveyance; the settlor, on the eve of the judgment he confessed to the plaintiff, passed over two promissory notes to the trustee's successor, in part performance of the settlement, as it was said. For the plaintiff it was contended that this was fraudulent, and as such to be passed upon by the jury. The court overruled this position; and erroneously, as is submitted, assumed to itself to determine that there was no fraud unless the settlor and the trustee concurred in it.

Thirdly. The deed of settlement was not recorded till after the plaintiffs' judgment; in which case the act of assembly of New Jersey is explicit that the conveyance is inoperative as against the judgment. Act of 5th June 1820, Laws of New Jersey, ed. 1821, page 747. Two cases have been determined in South Carolina, where the law is similar, that are strongly in point. Ward v. Wilson, 1 Dessaus. 401. Forrest v. Warrington, 2 Dessaus. 254. The statute of uses, 27 Elizabeth, ch. 10, annexes the possession to the use. The house and lot held by Mr Stockton in trust for his daughter became her property by the express terms of this statute: the husband by occupation reduced it into his possession; and the plaintiffs' judgment binds it notwithstanding the marriage settlement. The statute is positive that of real estate held for her use the seisin is in her. 4 Cruise, Dig. 96 (133); 419 (420), tit. xi. ch. 3, s. 4, 5, 6. The charge is that the marriage article is not a conveyance, but an executory covenant; which makes no difference, for the statute in terms comprehends that with all similar cases. It is the very case the statute intended to provide against.

Mr Binney, for the defendant in error.

There cannot be a better introduction to the defendant's argument, than a reference to Carver v. Jackson, 4 Peters, 80, upon the sweeping exceptions to the charge of the circuit court, which this bill of exceptions exhibits. The whole charge is set out, and the whole is excepted to, the recommendation of this court to the contrary notwithstanding; and the proper corrective of the practice if persisted in, would seem to be, to disregard every exception which any possible interpretation of the charge can obviate. A fair interpretation, as it is termed, does not belong to a practice which, whatever be its motive, is unjust to the court, the opposite counsel, and the cause. Nothing, however, is necessary to support this charge but the application of common rules.

What the plaintiffs' paper book calls the *overpowering* argument of the court upon the facts, is not a ground of exception. Whether the opinion of the court was right or wrong, it did not bind the jury. It may be difficult in some cases, and it was impossible in this, to say any thing about the facts, without an *overpowering* argument against the plaintiffs' claim. So far as that claim asserted any intentional wrong in any one of the parties to the settlement, it was wholly without foundation or colour. The naked question presented by the case, if question it was, was whether an antenuptial marriage settlement, a settlement in consideration of marriage, without the least suspicion by the intended wife or her trustee of either insolvency or debt on the part of the intended husband, was good against creditors. The facts exhibit nothing to vary the terms of this question. In the autumn of 1825 the defendant was worth from eighty to ninety thousand dollars, without any debt, and without any responsibility, except for a respondentia contract, which resulted in no loss. In September he made proposals of marriage and of settlement, and was accepted. On the 19th of December the articles in question were executed, after a statement of his property, set forth in the bill of exceptions. The marriage soon afterwards took place. The defendant then completed the house upon Mr Stockton's lot, at a cost of about twelve thousand dollars, and furnished it at a cost of about four thousand dollars, and in 1829 he handed to

the trustee five thousand dollars of good, and four thousand five hundred dollars of doubtful property, on account of the marriage settlement; and this is all that it has produced. The plaintiffs' demand, and the only demand in existence against the defendant, except a loan for personal expenses during his embarrassments, arose out of a contract in Canton, of the 22d November 1825. It was a loan of sixty-three thousand dollars, made upon a pledge of all the merchandize which that sum purchased in Canton, and twenty-three thousand dollars more, with the additional benefit of coming freight free to the United States, the intended market of the investment. The loan was made without the knowledge, and against the expectation of the defendant, but in virtue of a power left behind him to meet the contingency, which occurred, of his father's ships requiring funds to fill them up; and the commercial disasters of the season not only absorbed the entire pledge, but left the defendant a debtor to the extent of the judgment in the circuit court. The peculiar feature of this debt is therefore, that it is the *residuum* of a mortgage debt, after an original pledge of the entire investment of the money and a third more, and the specific transaction moreover unknown to the debtor at the time, and of course to the intended wife. What effect such a debt would have upon a *postnuptial* settlement, is a question that does not arise here. It would be a stronger case for such a settlement, than has ever been held to be insufficient.

The statute 13 Elizabeth does not avoid any settlement as *voluntary*, but only as *fraudulent*. *Actual* fraud in such a case could not be suggested upon the evidence; and if the law would *presume* it, it must do so in every imaginable case in which the settled property becomes necessary, by subsequent disaster, to pay the husband's previous debts. This proposition does not appear to be warranted by the books. The present is, however, an *antenuptial* settlement, upon the valuable consideration of marriage, the very highest consideration, as it is in one instance said, that is known to the law. 2 Eq. Ca. Abr. 585. It is valid against purchasers as well as creditors, purchasers even without notice, unless they have got the legal estate; for the wife is a purchaser, and has equal equity. Atherly, 129, 151; Roberts on Fraud. Con. 102, 103; Bar-

nell v. Peacock, 2 Roll. Rep. 105; Sir Ralph Bovy's case, 1 Ventr. 194; Douglass v. Ward, 1 Cases in Chan. 99; Ex parte Marsh, 1 Atk. 158; Brown v. Jones, 1 Atk. 190; North v. Ansell, 2 P. Wms. 618; Wheler v. Caryl, Ambl. 121; Brown v. Carter, 5 Ves. Jun. 878; Doe v. Routledge, Cowp. 712; Nairne v. Prowse, 6 Ves. Jun. 752; East India Company v. Clavel, 3 Bac. Abr. 315, *Fraud*.

Being such a consideration, the statute 13 Eliz. expressly excepts it from its operation. It excepts deeds upon valuable consideration, even fraudulently intended by the grantor to defeat his creditors, unless the grantee has notice or knowledge of such covin. The intended wife, and not merely her trustee, must have notice or knowledge that the bounty of the husband is intended as a fraud upon his creditors. Nothing short of this will answer. The fraud and the intended fraud, without such notice, are nothing more than in the case of an ordinary sale. Barrow v. Barrow, 2 Dick. 504; Champion v. Colton, 17 Ves. 263; Tunno v. Trevisant, 2 Desaus. 264; Preble v. Boghurst, 1 Swanst. 319.

The plaintiffs' counsel, while he impugned the doctrine in the circuit court, admits it here, and objects to the charge because it goes further. He understands the judge to have charged that something more is necessary than notice of the intended fraud; that there must be combination, concurrence, confederacy, preconcert. Supposing this not to have been explained or qualified, it means nothing more than what must exist in every such case as the plaintiff alleged this to be, one, namely, in which notice, if brought home at all, was so to a *party* with whom a previous negotiation was made for the deed, and who, in consummation of the treaty, accepted the deed. In such a case, all parties are actors in the fraud. The fraud is perpetrated with the aid of a party conscious of it, and assisting at its birth. If A. makes a fraudulent deed to B., C. may know of it, without combining or concurring; but if B. has notice of the fraud before, and at the time of accepting the deed, he is guilty of combination, concurrence, confederacy and preconcert with the grantor. There is unity of action and design in both. The statute, in such a case, punishes the

grantee by a penalty. This, consequently, was good law in reference to the case, as the plaintiff himself stated it.

But the court did not say that something *more than notice* was necessary. They simply stated what in every such case notice to the grantee must amount to. This meaning is obvious from many parts of the charge, and particularly from the concluding summary, in which the instruction is given to the jury. "A settlement made before marriage, makes the intended wife a purchaser. If agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was bona fide, and without *notice of fraud.*" The facts of fraud in the husband, and notice to the wife, were left to the jury. The doctrine of the court was, that both must be shown by the plaintiff; and if this is right, the main exception fails.

The main points adhered to in this court by the learned counsel, admit of short answers.

1. The paper book misstates the charge as to the furniture. The bill of exceptions must be the guide. It shows the plaintiffs' prayer to have been for an instruction that the expenditure of five thousand dollars in furnishing the house was per se fraudulent, which the court refused. There is no such proposition in law, as that a covenant "to furnish a house *in a suitable manner*, as the husband shall judge fit and proper," which is the language of the covenant, or an actual expenditure to the extent of five thousand dollars, is per se fraudulent. There must be other circumstances. These were marriage articles, rather than a consummate settlement, and chancery will so mould and control them as to effectuate the intention, annulling the excess of the execution beyond what was lawfully intended. Atherley, 92, 106, 121. It is a strong proposition to assert, that an unsuitable expenditure by the husband, contrary to the express language of his covenant, shall defeat the wife's settlement for any thing more than the excess, when that is made out by evidence. The court expressed an opinion that the expenditure might be bad for the excess when shown, and were right in refusing to say that a given expenditure was, per se, a fraud.

2. The delivery of notes to the trustee, upon the eve of the plaintiffs' judgment, was good, if the settlement was so. The trustee was a creditor to a much larger amount, and the debtor had a right to prefer him. The court were right in saying that the payment or delivery was good, unless made by the defendant with the intention of covering the property under pretence of the articles, and so accepted by the trustee.

3. The New Jersey statute of 5th June 1820, is wholly misconceived, or rather its effect. If the deed is void by reason of the non-registry, the real estate, upon which alone the statute has any bearing, remains the property of R. Stockton, and is liable to his creditors. The creditors of the grantor, and not the grantee, are the creditors meant by the statute. It is difficult to sustain the exception, that the judgment against Thompson is to prevail over the settlement and defeat it, when it is only by the validity of the settlement that Thompson can have any thing in the land for the judgment to affect. It is a further mistake to suppose that any use in the real estate, in the settlement, was executed by the statute in the defendant. The legal estate was intended to remain in R. Stockton, for the performance of the trusts. They could not be performed without it. He was in certain events to lease, to receive the rents, to convey. The execution of a use in the defendant, would have been contrary to the whole scope of the articles, and therefore it is not executed. 1 Saunders on Uses, 246, 206, 208, and the authorities there cited; 1 Shep. Touch. 505.

But if executed in the defendant as to the legal estate, it could not have altered the case, as he would have thereby become a trustee for the purposes of the settlement; and, consequently, for the separate use of his wife and her children.

Mr Justice Story delivered the opinion of the Court.

This is a writ of error to the circuit court for the district of Pennsylvania. The original action was a feigned issue between the plaintiffs, who are creditors, and the defendant, to try the question, whether he is able to pay the debt due to them; and this depends upon the validity of certain articles of settlement, made in contemplation of a marriage between the defendant and Miss Annis Stockton, daughter of the late Rich-

ard Stockton, Esq. stated in the case. The verdict in the court below was for the defendant; and judgment having been rendered thereon accordingly, the present writ of error is brought to revise that judgment, upon a bill of exceptions taken to the charge of the court at the trial.

The whole charge of the court is spread upon the record (a practice which this court have uniformly discountenanced, and which, we trust, a rule made at the last term will effectually suppress); and the question now is, whether that charge contains any erroneous statement of the law; for as to the comments of the court upon the evidence, it is almost unnecessary to say, after what was said by this court in Carver v. Jackson, 4 Peters's Reports, 80, 81, that we have nothing to do with them. In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered.

The material facts are as follows: The plaintiffs and the defendant were resident merchants in China; and the defendant left it in March 1825 to visit America. In the summer of that year he paid his addresses to Miss Stockton, then resident with her father in New Jersey, by whom his addresses were accepted; and in contemplation of marriage on the 19th of December of the same year the articles of marriage settlement referred to were executed. They purport to be articles of agreement and covenant between the defendant of the first part, Miss Annis Stockton of the second part, and Richard Stockton, father and trustee of Miss Stockton, of the third part. By these articles, after reciting the intended marriage, and that Richard Stockton, the father, had promised to give a certain lot of land (described in the articles) to his daughter, upon which the defendant, Thompson, had begun to build a house, it is stated that R. Stockton covenants, in consideration of the

said marriage, and his love and affection for his daughter, that from the time of the marriage he will stand seised of the lot and premises in trust to permit the defendant and Annis his wife to live in and occupy the same; and if they do not think proper so to do, then to let out the premises on lease, and receive the rents and profits and pay over the same to the said Annis during the joint lives of herself and her husband (the defendant); if the defendant should survive his said wife and have issue by her, then in trust to permit him during his life to inhabit and occupy the premises, if he should elect so to do, and to pay over the rents and profits to him for the support of himself and his family, without his (the defendant's) being accountable therefor; and after his death, in trust for the child or children of the marriage in equal shares as tenants in common; and if no children, then upon the death of either the husband or the wife, to convey the premises to the survivor in fee simple. By the same instrument the defendant covenants, that if the marriage should take effect, and in consideration thereof, he will, with all convenient speed, build and furnish the house in a suitable manner, as he shall judge fit and proper, and that the erections, improvements and furniture shall be subject to and included in the trusts. And further, that he will, in the space of a year from the marriage, place out at good security, in stock or otherwise, the sum of forty thousand dollars, and hand over and assign the evidences thereof to the trustee, who shall hold the same in trust to receive the interest, profits and dividends thereof for the wife, during the joint lives of herself and her husband. And if she should die before her husband, and there should be issue of the marriage, then in trust to receive the interest, profits and dividends, and pay the same to the husband during his life, for the support and maintenance of himself and children, without any account, and after his death, in trust for the children of the marriage. A similar provision is made in case of the survivorship of the wife; and if no children, then the trustee is to assign and deliver the securities and moneys remaining due to the survivor, to his or her own use.

Such are the most material clauses of the marriage articles. Before the execution of them, the defendant made out a writ-

ten statement of his pecuniary circumstances, in which he states that he owes no personal debts except to a small amount, in the common course of business; that he is surety for his father in a bottomry bond to Messrs Schott and Lippincott, in the penal sum of two hundred thousand dollars, upon which there was a pledge of goods, supposed to be sufficient to discharge the bond; and if any loss should accrue, it could not be more than twenty thousand dollars, and that he considered himself worth that amount, if not more, in addition to the sum proposed to be settled.

From the testimony in the case, which is stated in the charge, it appears that the marriage was consummated; that the defendant built the house on the lot mentioned in the articles at an expense of thirteen thousand dollars, and furnished it at the expense of five thousand dollars, but invested no part of the forty thousand dollars during the life of the trustee. It also appears, that at the time of executing the articles, he was worth about eighty or ninety thousand dollars in money and personal property; that his agent in China, in November and December 1825, borrowed of the plaintiffs sixty-three thousand dollars on the pledge and security of property of the invoice value of eighty-six thousand dollars and upwards, on the credit of the defendant, but entirely for the use of the defendant's father, in order to complete the cargoes of his ships, then at Canton short of funds. The property arrived at a losing market, and the debt now due to the plaintiffs by the defendant, grew out of their transactions, his father having failed on the 19th of November 1825; but the existence of the loan contracted with the plaintiffs, was not known to the defendant (though fully authorized to be made, if necessary) until the spring of 1826.

The marriage articles were never recorded in New Jersey, where the land lies, until May 1830, after the death of the trustee. In September 1829, shortly before the plaintiffs obtained a judgment for either debt against the defendant, the defendant delivered over to captain Robert Stockton, the son of the trustee, who succeeded him in the trust, securities to the amount of nine thousand five hundred dollars on account of the sum to be invested pursuant to the marriage articles.

Such are the material facts which appeared at the trial; and the question was, whether, under all the circumstances, the marriage articles were void as a fraud upon creditors. With reference to this point, the learned judge who delivered the charge to the jury, made, among others, the following remarks. "To taint a transaction with fraud, both parties must concur in the illegal design. It is not enough to prove fraud in the debtor. He may lawfully sell his property, with the direct intention of defrauding his creditors, or prefer one creditor to another. But, unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid against other creditors or purchasers, who may be injured by the transaction." "Before you can pronounce this marriage agreement void and inoperative on the ground of actual fraud, you must be satisfied, not only that the defendant made it with design to defraud his creditors, but also that Mrs Thompson, and her father and trustee, Mr Richard Stockton, participated and concurred in the fraud intended. If they were innocent of the combination, it would be harsh and cruel in the extreme to visit on her the serious consequences of her intended husband's acts, and as inconsistent with law as justice." "The deeds, gifts, grants or other contracts, which the law avoids, are those made with intent to defraud, hinder, delay or injure creditors; and in order to avoid them, both the party giving and the party receiving must participate in the fraud." "The words of the law (the statute of 13 Elizabeth, ch. 5), require that both parties must concur in the fraud in order to bring the same within the provisions."

Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The

husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration; and so that it is bona fide, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, after such notice, into execution.

The argument at the bar admits these principles to be incontrovertible. But it is supposed by the counsel for the plaintiffs in error, that the charge contains a different and broader doctrine; that it requires active co-operation, pre-concert and participation in the original design of fraud; and that notice of it is not sufficient to avoid the settlement, although all the parties, after such notice, proceed to execute it.

It appears to us that this is an entirely erroneous view of the scope and reasoning of the charge, even in the passages above cited. But taking them in connexion with other passages in the same charge, it is beyond doubt that no such distinction was in the mind of the court, or was in fact uttered to the jury. The language of the charge has reference to the actual posture of the case before the court, and not to any other possible state of facts. The case was not of a settlement already made and executed by the settler alone, with a fraudulent intent, to which settlement the wife or her trustee were not contemplated to be executing parties, and which was, after notice of the intent, accepted by them; in which the effect of notice might have been the very hinge of the cause. But the case was of marriage articles about to be executed by all the parties upon negotiations then had between them for that purpose; and of course, if there was a fraudulent design, known to all the parties at the time, the very execution of the articles made them all equally participators, and parties to the fraud. It necessarily involved combination, and participation, and pre-concert. It was to this posture of facts that the reasoning of the charge was addressed; and it met and stated the law truly, as applicable to them. Notice under such circumstances, necessarily included participation in the fraud. It was not possible that the wife and her trustee, with notice of an intended fraud on

the part of her husband, could execute the instrument without being, in the sense of the law, participes delicti.

But the charge does, in various other passages, distinctly point out to the jury the very doctrine which the plaintiffs in error assume as the basis of their argument, and for which they contend. Thus, in commenting upon the different classes of conveyances, to which the statute of 13 Elizabeth is applicable, it is observed, that all conveyances are valid and excepted, which are "for a valuable consideration, in good faith, without notice by the person receiving the conveyance of any fraud, covin or collusion by the grantor to defraud his creditors." Again "the consideration being valuable, if the contract, whether executed or executory, is made in good faith, with one having no notice or knowledge of any fraud, covin or collusion to defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in the whole or in part, as is in the power of the party." Again, "it is the opinion of the court, that the evidence in this case brings the marriage contract within the sixth section of the law (the act of 13 Elizabeth), excepting it from the operation of the first section; unless you shall find that it was made, not bona fide, or with notice or knowledge of a fraud in John R. Thompson in entering into it, brought home to his intended wife, and that Thompson actually entered into it with such fraudulent, covinous and collusive intention." And, without dwelling on other passages equally expressive, it is added in the very close of the charge, "we conclude, then, with instructing you, that a settlement made before marriage, makes the intended wife a purchaser for a valuable consideration; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was bona fide and without notice or fraud." That these directions are correct in point of law, cannot admit of doubt; and that they cover the whole ground asserted in the argument for the plaintiffs, seems equally undeniable. We may then dismiss any further commentary on this part of the case.

The next objection is, to the charge of the court in regard to the furniture. The court were requested to charge the jury

that the expenditure of five thousand dollars in furnishing the house was, per se, fraudulent. The court refused so to do, stating, "that furniture is part of the marriage contract, to be provided by Thompson, in a suitable manner, as he should think fit. He had a discretion which he might exercise in a reasonable manner, according to their station and associations in life, proportioned to the kind of house and extent of income; the trustee or wife could not, in law or equity, compel Thompson to furnish it extravagantly, or at useless and wanton expense; and if he should do it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we can say that it is a fraud in law to expend five thousand dollars in furnishing a house costing thirteen thousand dollars, and the establishment to be supported by the income of an investment of forty thousand dollars in productive funds; we must be satisfied that it is, at the first blush, an extravagant and unwarranted expenditure under all the circumstances in evidence, and to an extent indicating some fraudulent or other motive unconnected with the fair execution of the contract, of which we are not satisfied."

It is difficult to perceive any error in this direction; and it was going quite as far in favour of the plaintiffs in error as the law would warrant; for the change of circumstances of the defendant made no difference in his obligations to perform the stipulations of the marriage articles. The court might well have refused to give the instruction without any explanation, for it was asking them to decide, as matter of law, what was clearly matter of fact. The argument at the bar has indeed insisted that the court misunderstood the object and request of the counsel; but there is no evidence of that on the record, and certainly it is not to be presumed.

The next objection is to the charge of the court respecting the delivery of the notes to Captain Robert Stockton, in September 1829. The court were requested to charge the jury, that the delivery of these notes to Captain Stockton was a fraud. The court directed the jury that "if it was done in order to comply, in part, with the agreement, it was not so. If it was colourable, made with the intention of covering and conceal-

ing so much, under pretence of the marriage articles, for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors; but if delivered with such intention, and not so accepted, then Captain Stockton might not only fairly apply it to the trust fund, but was bound so to do. Though it may have been done on the eve of the judgment confessed in New Jersey, that would make no difference; it being to carry into effect the agreement of December 1825."

We cannot perceive any error in this part of the charge. The wife became a purchaser and creditor of her husband, in virtue of the marriage articles; and if the delivery of the notes was made in part performance of these articles, bona fide, and without fraud, it was a discharge of a moral as well as of a legal duty. Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his wife.

The remaining objection is, that the marriage articles are inoperative and void, not having been recorded within the time prescribed by the laws of New Jersey for the registration of conveyances. To this objection several answers may be given, each of which is equally conclusive against the plaintiffs in error. In the first place, marriage articles or settlements, as such, are not required by the laws of New Jersey to be recorded at all, but only conveyances of real estate; and as to conveyances of real estate, the omission to record them, avoids them only as to purchasers and creditors, leaving them in full force between the parties. This is the express provision of the statute of New Jersey of 1820(*a*): so that, notwithstanding the non-registration, the articles were good between the parties. In the next place, as to the personal estate, covenanted on the part of the defendant to be settled on his wife, whether furniture or money, it is clear that the non-registration of the articles could produce no effect whatever. If the conveyance was free of fraud, it was as to the personal estate completely valid, even against creditors. In the next place, as to the real estate covered by the articles, whether these articles are treated as an actual conveyance, or as an executory contract, it is clear, that

(*a*) See the act of 1820. Laws of New Jersey, edition of 1821, p. 747.

except as to the creditors of the grantor, Mr Stockton, they were completely valid, and operative. Viewed as a conveyance, or as a contract for a conveyance, the husband could not, consistently with the avowed trusts, take any legal estate or executed use in the real estate. The grantor necessarily remained the legal owner, in order to effectuate the trusts of the settlement; and the husband could entitle himself to the benefit of the trusts provided in his favour, only in the events and upon the contingencies which are therein stated. He had no equitable interest therein capable of a present appropriation by his creditors. In every view of the circumstances, it is therefore clear, that the non-registration of the articles does not touch the plaintiffs' rights; and the court were correct in their instruction to the jury, "that the marriage contract is not void for want of being recorded in time."

Upon the whole, it is the unanimous opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

Judgment accordingly.

THOMAS DEYE OWINGS, AND OTHERS, APPELLANTS v. ANDREW KINCANNON, APPELLEE.

Appeal dismissed because all the parties to the decree in the circuit court had not joined in the appeal to this court.

APPEAL from the circuit court of the United States for the district of Kentucky.

In the circuit court of Kentucky, Andrew Kincannon, the appellee, filed a bill on the 28th of December 1815, claiming a tract of land by virtue of a prior entry to that under which the persons named in the bill asserted a title to, and held possession of the land; and praying the court to compel the defendants to release all claim to the same, and that he might be quieted in the enjoyment and possession thereof.

The bill was filed against Thomas Deye Owings, James M. Blakey, Ralph Phillips, John Head, Benjamin Head, Milton Stapp, Charles Buck, and nineteen others, as defendants, and was afterwards dismissed as to some, and abated as to others of the persons so named. During the pendency of the proceedings Ralph Phillips and John Head died, the former leaving Lewis W. R. Phillips his heir, and the other leaving Nancy Head, and his widow, Sally Head, his only child; who after the decease of their respective parents became defendants in the cause.

At November term, 1825, the circuit court made a decree in favour of the complainant, by which it was ordered, that the complainant do recover against the defendants Thomas Deye Owings, James M. Blakey, Ralph Phillips, Milton Stapp, John L. Head, and Charles Buck, and that said defendants do, on or before the first day of March next, by deed, with warranty against themselves and their heirs, convey and release unto the complainant all their right, title, and interest, in and to the land represented on and designated on the connected plat, returned under an interlocutory decree formerly made.

On the 15th of May 1830, an order was made granting an appeal, and the following bond was executed, a copy of which was certified in the record.

[Owings and others v. Andrew Kincannon.]

Know all men by these presents, that we, Lewis W. R. Phillips, Sally Head, Nancy Head, and are held and firmly bound unto Andrew Kincannon in the sum of five hundred dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, and sealed with our seals, and dated this 15th day of May 1830.

The condition of the above obligation is such, that whereas the above bound Lewis W. R. Phillips, Sally Head, and Nancy Head, have prayed for and obtained an appeal from the seventh circuit court of the United States in and for the Kentucky district, to the supreme court of the United States, in a certain suit in chancery wherein the said Andrew Kincannon was complainant, and Thomas D. Owings, Ralph Phillips, the ancestor of said L. W. R. Phillips, and John L. Head, the husband of said Sally Head, and ancestor of said Nancy Head, were defendants.

Now, if the said Lewis W. R. Phillips, Sally Head, and Nancy Head, shall well and truly prosecute the said appeal with effect, or on failure thereof pay to the said Andrew Kincannon all costs that he incur in the defence thereof, and may be legally awarded against them, the said L. W. R. Phillips, Nancy and Sally Head, then the above obligation to be void, otherwise to remain in full force and virtue.

THOMAS TRIPLETT, [SEAL.]

On the 18th May 1830, the following citation was issued to Andrew Kincannon. Whereas an appeal has been prayed by Lewis W. R. Phillips, sole heir of Ralph Phillips, deceased, and Sally Head, widow, and Nancy Head, the only child of John L. Head, deceased, and is hereby granted to the supreme court of the United States, to reverse a decree of the seventh circuit court of the United States in and for the Kentucky district, at the November term, one thousand eight hundred and twenty-five, wherein the said Andrew Kincannon is complainant, and Thomas D. Owings, &c., with ancestors of said L. W. R. Phillips and S. and N. Head were defendants.

These therefore are to cite and command you that you be and appear in the supreme court of the United States at the city of Washington, on the second Monday in January next,

and then and there to be heard, if any thing you have to say upon the said appeal.

Witness my hand, as an associate justice of the supreme court of the United States, and presiding judge of the seventh circuit court of the United States of America in and for the Kentucky district, this 18th day of May 1830.

JOHN M'LEAN,
Justice Supreme Court United States.

Mr Bibb, for the appellee, moved to dismiss the appeal, on the ground that the decree of the circuit court of Kentucky was against Thomas Deye Owings, James M. Blakey, Milton Stapp, and Charles Buck, as well as against the appellants; yet the appeal had not been prosecuted by any others than those named in the citation, Lewis W. R. Phillips, Sally Head and Nancy Head.

By the record it appears that the appeal was allowed generally; but the bond is given by L. W. R. Phillips, Sally Head and Nancy Head only. It is therefore the proceeding of those parties only.

No exception is taken to the execution of the bond, as by the decisions of the state courts of Kentucky, and also of the circuit court, a bond requiring surety, in legal proceedings, need not be executed by any but the surety of the parties for whom he has consented to become bound.

Mr Loughborough opposed the motion. He contended that as the appeal had been allowed to all the parties, the bond and citation operated generally, and all the defendants were before the court as appellants. But if this was to be considered as the separate appeal of some of the defendants, it was legal. Cited Coxe v. The United States, 6 Peters, 172. The appearance of the defendant in error, which was entered at January term 1831, and other proceedings on his part, by motion in the case, deprived him of a right to move to dismiss the appeal at this term cited.

Mr Chief Justice MARSHALL delivered the opinion of the court.

[Owings and others v. Andrew Kincannon.]

This is an appeal from a decree pronounced in the court of the United States for the district of Kentucky, by which Thomas Deye Owings, James W. Blakey, Ralph Phillips, Milton Stapp, John L. Head and Charles Buck were directed to convey and release to the complainant all their right, title and interest in a tract of land mentioned in the decree. An appeal was allowed, and a bond executed by Lewis W. R. Phillips, Sally Head and Nancy Head, the condition of which recites "that, whereas Lewis W. R. Phillips, Sally Head and Nancy Head have prayed for and have obtained an appeal from the seventh circuit court of the United States in and for the Kentucky district to the supreme court of the United States, in a certain suit in chancery wherein said Andrew Kincannon was complainant and Thomas D. Owings, Ralph Phillips, the ancestor of the said L. W. R. Phillips, and John L. Head, the husband of said Sally Head and ancestor of Nancy Head, were defendants.

"Now, if the said Lewis W. R. Phillips shall well and truly prosecute," &c.

The particular statement in the bond is considered by the court as explaining the general entry granting the appeal, so as to show that from a joint decree against six defendants, only two, represented by their heirs, have appealed.

A motion is now made to dismiss this appeal, because the decree being joint, all the parties ought to join in the appeal.

Upon principle it would seem reasonable, that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal. We have however found no precedent, in chancery proceedings, for our government in this case. But in the case of Williams v. The Bank of the United States, 11 Wheat. 114, which was a writ of error, sued out by one defendant to a joint judgment against three, the writ was dismissed; the court being of opinion that it had issued irregularly, and that all the defendants ought to have joined in it.

By the judicial act of 1789, decrees in chancery pronounced in a circuit court could be brought before this court only by writ of error. The appeal was given by the act of 1803. That act declares "that such appeals shall be subject to the

same rules, regulations and restrictions as are prescribed by law in cases of writs of error."

Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in which writ all the defendants must have joined. The language of the act which gives the appeal, appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error. We think also that the same principle would be applicable, from the general usage of chancery, to make one final decree binding on all the parties united in interest.

The appeal must be dismissed, having been brought up irregularly.

On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Thursday the 17th day of January, by Mr Bibb, of counsel for the appellee, to dismiss this appeal, on the ground that only two of the parties, represented by their heirs, have joined in this appeal, the decree of the said circuit court being a joint decree against six persons, and of the arguments of counsel thereupon had: It is considered by the court that this appeal be dismissed, because only a part of those against whom the decree was made have joined in the appeal. Whereupon, it is ordered, adjudged and decreed by this court that this appeal be, and the same is hereby dismissed, it having been brought up irregularly. And it is further ordered, adjudged and decreed by this court that said appeal be, and the same is hereby dismissed with costs.

JOSEPH BARLOW, CLAIMANT OF EIGHTY-FIVE HOGSHEADS OF SUGAR, APPELLANT v. THE UNITED STATES.

Construction of the acts of congress relative to drawback on refined sugar. The legislature did not in the enactments in reference to drawback intend to supersede the common principle of the criminal as well as the civil jurisprudence of the country, that ignorance of the law will not exempt its violation.

ON appeal from the circuit court of the United States for the southern district of New York.

In the district court of the United States for the southern district of New York, a libel was filed by the United States, for the forfeiture of eighty-five hogsheads of sugar, alleging them to have been entered for the benefit of drawback under a false denomination; viz, as refined sugars, with intent to defraud the revenue.

The answer of the claimant, Joseph Barlow, denied that the sugars were entered by a false denomination, or with intent to defraud the revenue; and insisted they were refined sugars within the meaning of the act of congress. Testimony was taken in the district court by the parties to the proceedings, and that court decreed as follows:

"The sugars mentioned in the pleadings in this cause is not refined sugar within the meaning of the act of congress of January 21, 1829, and that entry was made of the said sugar in the office of the collector of the port of New York for exportation by a false denomination, the same being entered by the owner for the benefit of drawback or bounty, under the denomination of refined sugar. But it is further considered and decreed, that it has been made to appear, to the satisfaction of this court, that such false denomination happened by the mistake of the claimant, the owner, in believing bastard sugar to be refined sugar, entitled to the drawback provided by the said act of congress. And it is further considered and decreed by this court, that the forfeiture of the said sugar so entered has not been incurred by the owner. It is further ordered and decreed

by this court, that the said claimant pay the taxable costs of the libellants and of the officers of this court in this cause; and that, therefore, the libel filed in this cause be dismissed, and that the said sugar be delivered up on demand, at reasonable times, to the said claimant; and it is further ordered, that a certificate of probable cause of seizure be given to the collector or officer of the customs, by whom the seizure of the said sugar may have been made."

From this decree both parties appealed to the circuit court for the southern district of New York. On the 4th January 1831, the circuit court made the following decree.

This cause having been brought to a hearing upon the pleadings and proofs therein, and counsel having been heard upon the appeal by the United States of America, as well as upon the appeal by Joseph Barlow, the claimant of the sugars mentioned in the pleadings in the cause, and the court having taken time to advise as to its decision, due deliberation being had, it is now ordered, adjudged, and decreed by the court, and his honour, Smith Thompson, judge of this court, doth order, adjudge, and decree, that the appeal of the said Joseph Barlow, claimant as aforesaid, be dismissed, with costs.

And it is further, in like manner, ordered, adjudged, and decreed, that the decree of the district court of the United States for the southern district of New York, so far as the same acquits the said sugars from forfeiture, for the causes in the libel in this cause mentioned, be reversed, with costs.

And it is further, in like manner, ordered, adjudged and decreed, that the said sugars are not refined sugars, entitled to the benefit of drawback or bounty, within the meaning of the act of congress of the 21st of January, anno domini eighteen hundred and twenty-nine, and that the same were entered in the office of the collector for the port of New York, for the benefit of drawback or bounty, under a false denomination, and with intent to defraud the revenue of the United States.

And it is accordingly, in like manner, further ordered, adjudged, and decreed, that the said sugars be, and the same are condemned, as forfeited to the use of the United States, and that the said United States do recover their costs of suit,

to be taxed against the said Joseph Barlow, claimant as aforesaid.

The claimant appealed to this court.

The case was argued by Mr Morton and Mr Ogden for the appellant, and by Mr Taney, attorney-general, for the United States.

Mr Justice STORY delivered the opinion of the Court.

This is a libel of seizure instituted in the district court for the southern district of New York, which comes before this court upon an appeal from a decree of the circuit court of that district, condemning the property, viz. eighty-five hogsheads of sugar, as forfeited to the United States.

The charge in the libel is, that the sugars were entered in the office of the collector of the customs for the district of New York for the benefit of drawback or bounty upon the exportation thereof, by a false denomination, with an intent to defraud the revenue. The claimant in his claim admits that he made the entry for the benefit of the drawback on the exportation; but he denies that the entry was made by a false denomination; and he asserts, that the sugars are truly refined sugars, as they are denominated in the entry.

The eighty-fourth section of the duty collection act of 1799, ch. 128, upon which the libel is founded, provides, that if any goods, wares, or merchandize, of which entry shall have been made in the office of a collector for the benefit of drawback or bounty upon exportation, shall be entered by a false denomination, or erroneously as to the time when, and the vessel in which they were imported, or shall be found to disagree with the packages, quantities, or qualities, as they were at the time of the original importation, &c. &c., all such goods, wares, and merchandizes, &c., shall be forfeited; provided, that the said forfeiture shall not be incurred, if it shall be made appear to the satisfaction of the collector, &c., or of the court, in which a prosecution for the forfeiture shall be had, that such false denomination, error, or disagreement, happened by mistake or accident, and not from any intention to defraud the revenue.

The language of this section is certainly sufficient to include the case at bar, if all the material facts are established. The sugars were entered for the benefit of drawback, or bounty, in the office of the collector; and if the entry was by a false denomination, the forfeiture is incurred; unless the claimant can avail himself of the proviso, or some other matter in defence.

It has, however, been contended at the bar, that in the case of refined sugars exported for the benefit of drawback and bounty, no entry is required by law to be made at the office of the collector; but that a system of regulations has been specially provided for such exportations, which supersedes or controls those of the eighty-fourth section. And in support of this argument it has been urged, that the eighty-fourth section applies only to articles which have been previously imported and subjected to duties.

It appears to us upon full consideration, that this argument is not well founded. Sugars have been made subject to duties upon their importation from the first establishment of the government down to the present time in every tariff law; and it is notorious, that until after the acquisition of Louisiana in 1803, no sugars were grown in the United States; and, consequently, all which were used or refined within the United States must have been of foreign growth and importation. So, that if an entry under the eighty-fourth section were required only upon the exportation of dutiable articles which had been imported, all sugars, whether refined or not, might have been within the provisions of that section. This is rendered still more obvious by the terms of the act of the 5th of June 1794, ch. 51, which first gave a drawback upon refined sugars. That act laid a duty of two cents per pound upon all sugar which should be refined in the United States; and declared, that the duties thereby laid upon such sugar, should and might be drawn back upon such sugar refined within the United States after the 30th of September then next, which after that day should be exported from the United States to any foreign port or power; "and adding to the drawback upon sugar so exported three cents per pound *on account of duties paid upon the importation of raw sugar.*" This act was continued in force until March 1801; and then was permitted to

expire. It contains, however, substantially the same provisions in regard to the proceedings to be had by the exporter upon the exportation of refined sugar, as are contained in the subsequent acts, by which the system of drawbacks upon refined sugar was revived; and especially the act of 24th of July 1813, ch. 21, which still remains in full force.(*a*) So that it is clear, that the regulations prescribed on the subject of the drawback upon refined sugars by the act of 1794 were not supposed by the legislature to interfere in any manner with the provisions of the eighty-fourth section of the act of 1799; but were deemed auxiliary to the same general object, the prevention of frauds upon the revenue. They are quite compatible with each other, and aim at the same result. The terms, however, of the eighty-fourth section are not confined to cases of drawback upon imported goods (though from what has been already stated all sugars at that period must have fallen under that predicament); but they apply to *any* goods, wares and merchandize, of which entry shall be made for the benefit of drawback or bounty. Other provisions of the act of 1799, ch. 128, demonstrate this intent in the fullest manner. The bounty given by the eighty-third section of the same act, on pickled fish and salted provisions, would be strongly in point. But the seventy-sixth section of the same act speaks directly to the purpose; and after prescribing the notice to be given by the exporter to entitle himself to the benefit of the drawback, it provides that he shall make entry of the particulars thereof at the custom house, &c.; *and if imported articles*, the name of the vessel, &c. and the place from which they were imported. So that the form of the entry contemplated cases of non-imported, as well as of imported articles. The act of 20th of February 1819, ch. 447, manifestly contemplates the same system of entries in such cases as then fully in existence; for it provides, that "in addition to the forfeitures and penalties heretofore provided by law for making a false entry with the collector of any district of any goods, &c. for the benefit of drawback or bounty on ex-

(*a*) See act of 24th of July 1813, ch. 21; act of 30th April 1816, ch. 172; act of 20th April 1818, ch. 365, sect. 11; act of 20th January 1829, ch. 11.

portation, the person making such false entry shall, except in the cases heretofore excepted by law, forfeit and pay to the United States a sum equal to the value of the articles mentioned or described in such entry." It is impossible to give any rational interpretation to this enactment, unless by referring it back to the eighty-fourth section of the act of 1799, as one then operative in its fullest extent on all subjects of drawback. And the circumstances of this case abundantly establish, that such has been the practical construction of these acts by the government, as well as of the custom house department. We think, then, that this objection cannot be sustained.

The next question is, whether the sugars were in this case entered by a false denomination. They were entered by the name of "refined sugars." They were, in fact, sugars known by the appellation of *bastar*, or *bastard* sugars, which are a species of sugars of a very inferior quality, of less value than the raw material; they are the residuum or refuse of clayed sugars, left in the process of refining, after taking away the loaf and lump sugar, which results from that process. The question is, whether this species of sugar is, in the sense of the acts of congress, "refined sugar." These acts allow a drawback "on sugar refined within the United States."

It has been contended in argument, that all sugars which have undergone the full process of refining, after they have arrived at the point of granulation, are properly to be deemed refined sugars, whether they have been clayed or not. In a certain sense, they may certainly be then deemed to be refined; that is, in the sense of being then clarified and freed from their feculence. But the question is, whether this is the sense in which the words are used in the acts of congress.

The acts of congress on this subject, are regulations of commerce and revenue; and there is no attempt in any of them to define the distinguishing qualities of any of the commodities which are mentioned therein. Congress must be presumed to use the words in their known and habitual commercial sense;

not indeed in that of foreign countries, if it should differ from our own, but in that known in our own trade, foreign and domestic. If in a loose signification among refiners, sugars should sometimes be spoken of as being refined, without having undergone the further process of claying; or if the whole mass resulting from that process should sometimes indiscriminately acquire among them that appellation in a like loose signification; still, if among buyers and sellers generally in the course of trade and business, the appellation "refined sugars," is exclusively limited to the products called lump and loaf sugar, and never includes bastard sugar, the acts of congress ought to be construed in this restrictive sense, as that peculiarly belonging to commerce. This was the doctrine of this court asserted in the case of Two Hundred Chests of Tea, Smith, claimant, 9 Wheaton's Reports, 438, 439; and there is not the slightest inclination on the part of this court to retract it. Now, without minutely sifting the evidence in this case, we think that there is a decisive and unequivocal preponderance of evidence to establish, that bastard sugar is not deemed, in a commercial sense, "refined sugar." The appellation is exclusively limited to such as have assumed at some time the form of white refined loaf or lump sugars. This is established, not merely by the testimony of merchants and grocers, and persons in the custom house, but by the testimony of sugar refiners. A sale of refined sugars would be deemed by them not complied with by a delivery of bastard sugars. If this be so, it puts an end to the question, whether the sugars in controversy were entered by a false denomination.

If they were entered by a false denomination, then they are subject to forfeiture, unless the party can bring himself within the exceptions of the proviso of the eighty-fourth section. And here the onus probandi rests on him to extract the case from the penal consequences of an infraction of the law. Were these sugars entered by a false denomination, happening by mistake or accident, and not from any intention to defraud the revenue? There was no accident in the case; there was no mistake in point of fact; for the party knew what the article was when he entered it. The only mistake, if there has been

any, is a mistake of law. The party in the present case has acted, indeed, with his eyes open; against the known construction given to the acts by the government and the officers of the customs. He has not been misled; and his conduct in the course of making the shipment, if it be entirely compatible with good faith, is not wholly free from the suspicion of an intention to overreach, and evade the vigilance of the custom house department. He has made every effort in his power to obtain the drawback, by passing off, as refined sugars, what he well knew were not admitted to be such by the higher government officers.

But we do not wish to put this case upon any ground of this sort. It presents the broader question, whether a mistake of law will excuse a forfeiture in cases of this description. We think it will not. The whole course of the jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or
32 criminally; and it results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts to the detriment of the public. There is scarcely any law which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them. There is not the least reason to suppose that the legislature, in this enactment, had any intention to supersede the common principle. The safety of the revenue, so vital to the government, is essentially dependent upon upholding it. For mistakes of fact, the legislature might properly indulge a benignant policy, as they certainly ought, to accidents. The very association of mistake and accident, in this connexion, furnishes a strong ground to presume that the legislature had the same classes of cases in view; accident, which no prudence could foresee or guard against, and mistakes of fact, consistent with entire innocence of intention. They may both be said, in a correct sense, to *happen*. Mistakes in the construction of the law, seem as little intended to be excepted

by the proviso, as accidents in the construction of the law. Without going more at large into the circumstances of the case, it is the opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel: on consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby affirmed, with costs.

JAMES W. BREEDLOVE AND WILLIAM L. ROBESON, PLAINTIFFS IN ERROR v. THEODORE NICOLET AND J. J. SIGG.

Jurisdiction. The plaintiffs, aliens, were residents of the state of Louisiana at the time of the execution of the note sued on in the district court of the United States for the eastern district of Louisiana, and continued to reside in New Orleans since, having a commercial house there; they are, however, absent six months in the year; but when absent have their agent to attend to their business. The defendants in the suit were residents of the city of New Orleans, and citizens of the state of Louisiana, when the note was given. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court.

The commercial partnership, the drawers of the note upon which the suit was instituted, was composed of three persons, one of whom was a resident citizen of Alabama, and out of the jurisdiction of the court when the suit was brought, and the remaining two, the defendants, were resident citizens of Louisiana. Held: that although the suit being against two of the three obligors might not be sustained at common law; yet as the courts of Louisiana do not proceed according to the rules of the common law, their code being founded on the civil law, this suit is properly brought.

The note being a commercial contract, is what the law of Louisiana denominates a contract *in solido;* by which each party is bound severally as well as jointly, and may be sued severally as well as jointly.

The plaintiff Sigg was denominated in the petition and writ "J. J. Sigg." The omission of his christian name at full length was alleged as error. By the court. He may have had no christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the name of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made; was not the partner of Theodore Nicolet & Co.; advantage should have been taken of it sooner. It is too late to allege it as error in this court.

The petitioners aver that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they are citizens.

If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the constitution nor the acts of congress require that aliens should reside abroad to entitle them to sue in the courts of the United States.

The suit not having been brought against Bedford, one of the partnership, it was not necessary to aver that he was subject to the jurisdiction of the courts of the United States.

After issue joined in the district court, the defendants filed a plea that the firm of Theodore Nicolet and Company, the plaintiffs, consisted of other

persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana. The court, after receiving the plea, directed that it be taken from the files of the court. Held, that this was a proceeding in the discretion of the court; and was not assignable as error in this court.

The plea was offered after issue was joined on a plea in bar, and the argument of the cause had commenced. The court might admit it; and the court might also reject it. It was in the discretion of the court to allow or refuse this additional plea. As it did not go into the merits of the case, the court would undoubtedly have acted right in rejecting it.

All the proceedings in a case are supposed to be within the control of the court while they are in paper, and before a jury is sworn, or judgment given. Orders made may be revised, and such as in the judgment of the court may have been irregular or improperly made, may be set aside.

Construction of the insolvent laws of Louisiana.

IN error from the district court of the United States for the eastern district of Louisiana.

This action was instituted in the district court by Theodore Nicolet and J. J. Sigg, both averred to be aliens, and citizens and subjects of the republic of Switzerland, but at present residing and trading in the city of New Orleans, under the firm and style of Theodore Nicolet & Co.

The petition of the plaintiffs sets out a joint and several demand against J. R. Bedford, James W. Breedlove, and William L. Robeson, formerly partners in trade, and doing business in the said city under the firm and style of Bedford, Breedlove & Robeson. The cause of action was a promissory note, subscribed by Bedford, Breedlove & Robeson, for two thousand nine hundred and sixty-four dollars and ten cents, dated at New Orleans 22d November 1826, payable sixty days after date to the order of the petitioners. The petition then avers that said Bedford, Breedlove & Robeson, have become indebted to the petitioners in the amount of said note, with interest and costs.

It further avers that Breedlove and Robeson are citizens of the state of Louisiana, and reside in New Orleans, and that each of them liable, as aforesaid; and prays that Breedlove and Robeson may be cited, and that judgment be rendered against them, jointly and severally, for the amount due. Attached to the petition is an affidavit, setting forth that Breedlove and Robeson are jointly and severally indebted, &c.

Two separate writs of capias ad respondendum were issued,

the one against Robeson, the other against Breedlove, upon which they were severally arrested and held to bail, under a special order of the judge.

In June 1829, the defendants filed their joint and separate answer to the petition, in which, reserving all legal exceptions, they aver that the said commercial house of Bedford, Breedlove & Robeson, of which they were partners, having become embarrassed by misfortunes, after the execution of the note sued on, to wit, March 16, 1827, made out a full and complete schedule, exhibiting the debts due by them, and the property and debts belonging and due to them jointly and severally, which said property was duly accepted by the judge of the parish court, for the benefit of the creditors placed upon said schedule.

Among their creditors were the plaintiffs, Theodore Nicolet & Co. then residents of New Orleans, in the state of Louisiana, and who were also residents of the same place at the time of the execution of the note now sued on.

After the said acceptance so made by said parish judge, a meeting of the creditors of Bedford, Breedlove and Robeson, was duly called. At the appointed time and place the creditors who assembled approved of the acceptance of the property made by the judge as aforesaid. Upon these proceedings judgment of discharge was finally rendered in favour of the defendants.

Afterwards the original note was filed, to wit, January 4, 1830, and, on the following day, viz. January 5, 1830, the defendants filed a plea to the jurisdiction.

In this plea, after setting out the note, they allege that the district court cannot properly exercise jurisdiction over the case, because they allege that said note was drawn by Bedford, Breedlove and Robeson, payable to the order of T. Nicolet & Co., who indorsed and assigned the same to one Frederick Beckman, who indorsed and assigned the same to J. J. Sigg, who assigned the same to Theodore Nicolet & Co. the present plaintiffs. The defendants then aver that said firm of T. Nicolet & Co. is composed of various other persons than the said Theodore Nicolet and J. J. Sigg; that, among the part-

ners in said firm, one Germain Mussen, and one M. P. Durell, and one Charles Lessept, all and each of whom are citizens of the United States, and state of Louisiana.

Further, they aver that Frederick Beckman, a remote indorser on said note, was, prior to the 5th July, 1828, and at the time of his transfer to J. J. Sigg, an alien, and a subject of the Hanseatic Towns: that, on the 5th July, 1828, he became a citizen of the United States, and state of Louisiana, and was so at the time of the institution of this suit, &c.

This plea was filed on the 5th January, after the hearing of the cause had been commenced, and the objection of the petitioners' counsel against then receiving it, was overruled.

On the 20th May 1830, on motion to reconsider and annul the order of January which permitted the defendants to file the plea to the jurisdiction, it was objected that it came too late, the cause having been put upon the jury calendar, and regularly called on that calendar for trial.

The court rescinded the order. 1st, Because it was not filed in time; the defendants having pleaded to the merits before oyer was given of the note; and, upon this plea, the cause was at issue when the plea to the jurisdiction was filed. 2d, Oyer of the note was not necessary to enable a party to plead in abatement the citizenship of the plaintiffs; that both branches of the plea to the jurisdiction deny the capacity of the plaintiffs to sue, and, therefore, ought to have been pleaded in abatement, and before issue joined on the merits; and that no material step was taken in the cause, between the reception of said plea and its subsequent rejection on reconsideration.

On June 7th, 1830, the cause came on for trial, when the following facts were admitted on the record:

That the persons, composing the firm of T. Nicolet & Co. were residents of the state at the time of the execution of the note sued, and have continued so up to the present time;

That they are absent about six months in the year; but, when so absent, have their agents to attend to their business, and their commercial house has existed in New Orleans ever since the execution of said note;

That Breedlove and Robeson were residents of the city of New Orleans, and citizens of the state of Louisiana.

The proceedings under the insolvent law of Louisiana were admitted in evidence.

The plaintiffs filed the protest of the note, which appears to have been made November 22, 1827, at the instance of Frederick Beckman.

On the 10th of June 1830, judgment was entered for the following terms:

The court having maturely considered this case, now order and adjudge, that judgment be entered up in favour of the plaintiffs against the defendants, jointly and severally, for the sum of twenty-nine hundred and sixty-four dollars and ten cents, with interest at the rate of five per cent per annum, from the twenty-fourth day of January 1827, until paid, and costs of suit.

To reverse this judgment the defendants prosecuted this writ of error.

The case was argued by Mr Coxe, for the plaintiffs in error, and by Mr Livingston, in a printed argument, for the defendants.

Mr Coxe contended that the judgment of the district court was erroneous, and ought to be reversed.

1. Because the action was irregularly instituted, no process having been sued out against Bedford, one of the partners, and the suit being a joint as well as a several one.

2. Because neither in the petition, writ, or in any part of the proceedings, is the christian name of Sigg set forth; which is essential.

3. Because there is no evidence that the petitioners were aliens, and, as such, authorized to sue in the courts of the United States; but the only facts in the case which can be judicially recognized, show them to have been at the date of the note, and still to continue, residents of New Orleans, and of the state of Louisiana.

4. Because, even if originally aliens, and never naturalized, such residence deprives a party of his right to sue in the courts of the union, as an alien.

5. Because there is no averment, or proof, that Bedford, one of the parties to the note, was subject to the jurisdiction of the courts of the United States.

6. Because the plea to the jurisdiction, under the circumstances apparent on the record, was lawfully filed, and ought not to have been taken from the files of the court.

7. Because the plaintiffs, being parties to the insolvent proceedings, were stopped from questioning the sufficiency of the discharge.

1. The note on its face shows that there were three persons who were drawers of the instrument; and this is also stated in the petition for process against the plaintiff in error. The petition sets forth that by thus jointly drawing the note in question, a joint and several responsibility was incurred. Yet process is prayed only against two of the parties, and no excuse is assigned for the omission to join the other party; no death is suggested, nor is it alleged that two only of the parties to the note were parties in the firm.

The remedy on such a contract, is, by the local law of Louisiana, the same as it would be at the common law, as a joint contract. Civil Code of Louisiana, 678, sect. 2, art. 2080.

But if the remedy be several as well as joint, there is equal error in the judgment of the district court. If a joint liability is to be enforced upon a joint contract, all the parties must be sued together; or if a separate as well as joint liability is the obligation of the contract, each of the persons must be separately sued, if this separate liability is to be enforced. A suit against two of them, bound by a joint and several contract, cannot be maintained. 2 Saund. on Pl. and Evid. 708; Streatfield v. Holliday, 3 T. R. 782. If it appear on the pleadings that another should have been joined, who has been omitted, the defendant may demur, arrest the judgment, or bring a writ of error. 1 Saund. Plead. and Evid. 14.

The judgment is joint and several. For this there is no authority in the law of Louisiana, and still less in the common law. Civil Code of Louisiana, 2081.

2. The omission of the christian name of Sigg, one of the plaintiffs below, is error. It is essential to all legal proceedings

that the names of the parties litigant shall be set forth; in civil suits the parties must be particularly named. 1 Bac. Ab. 50; King v. Harrison, 8 T. R. 508; 3 Caines's Rep. 170; 1 Pennington's Rep. 75, 137.

3. There is nothing on the record to show that the plaintiffs below were aliens, and this was essential to give, as it is to maintain the jurisdiction of the district court; and it is on the ground of the alienage of the plaintiffs that the jurisdiction is claimed. But it appears that they were residents of Louisiana at the date of the note, and at the institution of the suit.

The allegation of alienage being necessary to give jurisdiction to the court, it must be proved on the trial, on the general issue. 1 Paine, 194.

The presumption growing out of the facts which appear on the record is, that the plaintiffs were citizens of Louisiana, and consequently not authorized to sue other citizens of the same state in the federal court. If they were originally aliens, as residents of Louisiana at the time of the contract and of this suit, they are not competent to sue as aliens in the federal court.

The language of the constitution in reference to this subject does not employ the technical term "alien," but with a guarded phraseology confers jurisdiction in cases between "a state or citizen thereof, and foreign states, citizens or subjects." This form of expression seems rather to have been drawn from the laws of nations, than from any municipal code.

The object of this provision was to give to the general government, judicial authority over all subjects which might involve diplomatic discussion with foreign powers.

The eleventh section of the judiciary act of 1789, employs the word "alien," but it must be considered in subordination to the clause in the constitution. How then is this language understood in legal adjudication. Cited, 2 Gallis. 130; 2 Cranch, 64; 7 Cranch, 506, 511, 536, 542; 2 Dall. 41; The Joseph, 1 Gallis. 545, 551; 8 Cranch, 253, 254, 277; 3 Wheat. 14, 50; 6 Am. Law Journal, 83.

These cases show conclusively, 1. The national character of an individual is to be determined by the fact of residence.

2. That as to his capacities, as well as his disabilities, the same rule is to be observed.

The consequences of allowing foreigners domiciliated among us all the privileges of citizens, and all the immunities of aliens, are unjust. They thus obtain advantages which ought not to be conceded to them. Whenever they please, they may sue in the state courts, but their opponents cannot remove the cause. Whenever they think proper they may sue in the federal courts. Thus the policy of the law and the interests of the country are defeated. That policy is to induce aliens of character to become naturalized; but by giving these privileges, bounties are held out to avoid it.

In the same clauses of the constitution, and of this act of congress, provisions are made in cases of controversies between citizens of different states.

In settling questions arising under these provisions, the courts of the United States have exclusively regarded the naked fact of domicil. There is no such character recognized as a citizen of a state, further than he is a citizen of the United States, residing in a particular state, 4 Dall. 360; Coxe's Dig. 26; Cooper's Lessee v. Galbraith, 3 Wash. C. C. Rep. 546.

4. According to the law of Louisiana, the parties to suits may avail themselves of the privilege to have their causes tried by a jury; or they may prefer adopting the ordinary mode of a trial by the court. In the latter case, the trial is in conformity with the civil law; and the removal to the superior court is in the nature of an appeal, carrying up the entire record; the evidence as well as the pleadings.

The jurisdiction of the appellate court comprehends errors in law and errors in fact; and on this ground there is a fatal defect, that the record does not exhibit any proof of the parties who constituted the firm of Theodore Nicolet and Company, at the time of the contract. 2 Saund. Plead. and Ev. 704; 5 T. R. 709; the note was payable to Theodore Nicolet and Company.

It is equally fatal that there is no evidence to show that the plaintiffs had been made legally liable for the note as indorsers. The note had passed into various hands; it was held by one

Beckman; and unless they had been legally charged by the subsequent holders of the note with the payment of it, they would have no right of action against the drawers.

5. The insolvent proceedings in the record show that the plaintiffs in error were discharged by the court in which the same were instituted. To these proceedings the defendants in error were parties, and the contract was made with them in the state of Louisiana, so that they were bound by the insolvent laws of this state. Cited Ogden v. Saunders, 12 Wheaton, 213.

Mr Livingston, for the defendants in error, presented the following printed argument.

The first point made by the plaintiffs in error and defendants below is, that the suit was irregularly instituted; because no process was sued out against Bedford, one of the partners, the suit it is alleged being joint as well as several.

To maintain this position, the plaintiffs in error rely on authorities from the civil code of Louisiana, and others drawn from the rules of pleading at common law. If the first should sustain his position, he must prevail; with the second we have nothing to do in this cause.

I. The first inquiry is what was the nature of the obligation on which the suit was brought? It is a promissory note drawn by a mercantile firm consisting of three members; of whom two of the defendants in the original suit reside in the city of New Orleans, and the other is an inhabitant of Alabama.

The contract, then, being a commercial one, is, by the law of Louisiana, an obligation *in solido;* for the performance of which each of the parties is severally, as well as jointly, bound, and may be either jointly or severally sued.

The plaintiffs in error have cited article 2080 of the Civil Code of Louisiana, which provides that all the parties to a *joint* contract must be defendants to the suit; this is not denied, but this is an obligation *in solido*, not a joint one. It is defined by articles 2086, of the same code.

"There is an obligation in solido on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is

made by one of them, exonerates the other." This definition is taken from Pothier, *Traite d'obligation*, part 2, ch. 3, art. 8, sec. 1, No. 261.

"An obligation *in solido* is not presumed; it must be expressly stipulated;" but it adds, "this rule ceases to prevail where an obligation in solido takes place of right by virtue of some provisions of law." Civil Code of Louisiana, art. 2088. This article is also taken from Pothier, ubi supra, No. 265; and he gives as one of the cases in which it is presumed "when partners in commerce contract debts on account of their commerce."

This then being a debt so contracted by partners, is an obligation *in solido:* what are its effects as to obligors? Article 2088, "The creditor of an obligation in solido may apply to any one of the debtors he pleases, without the debtor having the right to plead the benefit of division." If then the plaintiffs below could have sued each of the partners in a separate suit, the error relied on is that he has sued two of them. Whether the common law authorities cited prove the position, is thought immaterial; because all that is required by the rules of pleading in Louisiana is, that the case be set out according to the truth, and that the law applicable to it entitles the party to relief.

Here the facts set forth in the petition are not denied; they show an obligation on each of the two parties made defendants to pay a certain sum; the prayer of the petition is that they may be decreed to comply with it exactly in the manner in which it was made, and the judgment is in precise conformity with the law that governs the case.

What would be the effect of allowing the exception? To force the plaintiff below to bring two actions in order to produce the same result obtained by one; a result, which it is the evident intent of the Louisiana mode of proceeding to avoid. Article 2081 of the Code is cited, to prove that the judgment ought not to have been jointly and severally entered: that article only directs the mode in which judgments on a *joint* obligation shall be rendered; and so far as it applies to the case, it shows that the judgment must conform to the nature of the obligation, which it does in our case.

II. The next objection is that the christian name of Sigg

is omitted; if there be any force in the observation, it comes now too late; the object of setting forth the name is to prove the identity of the person; but if that is done to the satisfaction of the party below, he cannot take advantage of it here: the plaintiff in the suit below is designated as J. J. Sigg, this is sufficient to a common intent; but non constat, that he had any other name. The two letters prefixed to his surname form distinct sounds, and why may not the godfather of Mr Sigg, have given him those names? Suppose a woman named Ellen, was to called herself in the pleadings L. N. would it not be sufficient, unless an exception was made to false spelling. As well might the creditors of the defendants attempt to set aside their own discharge; the designations of both of them are liable to the same objections. The one is called James *W.* Breedlove, and the other, William *E.* Robeson: now these intermediate letters may either be intended as the initial of some other name or they may merely be placed there to designate by their sound, the one individual from another; this last is a very common occurrence—if then a letter can perform this office when placed between two names, why may it not when placed simply before one.

III. The third objection, that the plaintiffs below were not proved to have been aliens is answered in two ways. 1st, By saying that this court have no means of knowing what was proved. This is not an appeal. That mode of reviewing judgments below is only given to this court, in cases of equity and admiralty—this case is neither. If the defendants below had thought the evidence insufficient, they might have spread it on the record by a bill of exceptions. This they have not done.

In the case of Parsons v. Bedford et al. 3 Peters, 433, this court decided that they could not examine into the facts so as to reverse a judgment below. It is true that was after a verdict, and the provision of the constitution in that respect was thought by the court to apply; but the reasons urged by the counsel and many of them used by the court, would seem to bear with propriety on a case like this.

In the case of Parsons v. Armor, 3 Peters, 414; the court went into a consideration of the case arising on the facts: but

they do so under an express declaration that they consider the case as coming under the description, either of a bill of exception, or a case submitted; for there all the facts were stated on the record to have been either agreed by the parties, or stated by depositions and documents. Here, on the contrary, there is no such statement of facts, and the certificate of the clerk is only that "the foregoing pages contain a transcript of the record and process, together with all the proceedings relating thereunto, the judgment of the court, bills of exception and documents therein referred to, and the writ and citation in error and return." Not a word mentioned of the evidence. So that this court cannot determine that no proof was offered that the plaintiffs below were aliens.

But secondly, whether proof were made of this fact or not is totally immaterial,—it is averred in the petition, and the only fact in issue by the answer is the discharge.

IV. A point not stated in the printed case seems to have been insisted on at the hearing, viz: that it does not appear by the record, that any proof was made that Nicolet and Sigg are the persons composing the firm.

To this, the same answers apply that were given to the third objection.

V. This objection (4th in the printed statement) appears to be tantamount to saying that residence and citizenship are synonymous. It has been repeatedly decided, that one of the parties being a resident of a different state from the other, will not give jurisdiction to the courts of the United States. Citizenship or alienage must be satisfactorily stated.

VI. The want of an averment that Bedford was subject to the jurisdiction of the court. The answer to this objection has been anticipated in that which was given to the first error assigned. Bedford was not a party to the suit. Those only are parties against whom process is prayed. The contract being in solido, he was not a necessary party.

VII. That the court did right in receiving the plea to the jurisdiction after the trial had begun, and were wrong in afterwards directing it to be withdrawn, is a position which appears contradictory to the best established rules of pleading. That the plea came too late. See 1 Mason, 364; The Sloop Abby,

1 Peters, 450, 498; 4 Mason, 437; 4 Peters, 480; 1 Martin's Rep. N. S. p. 4. That the court have a right to reverse their interlocutory decrees and to ratify an error while within their reach. 2 Cranch, 33; 3 Martin's Rep. N. S.

VIII. An objection, not in the printed copy, seems to have been insisted on in argument, that by the protest of the note while in the hands of Beckman, and the record of the suit brought by Sigg, as well as by the indorsements, it appears that the note had been the property of those persons respectively, and that it ought to have been shown that they were capable of suing in the court of the United States. If the objection were good in point of law, it fails under the circumstances of this case; because all the reasoning which applies to that which is founded on the alleged incapacity of the plaintiffs, may be used against this. But the ground is in itself untenable, although the payee of a note may have indorsed it to another, and he to a third; yet whenever it comes back to the hands of the payee, he holds it in his original right, and not under the subsequent indorsers.

IX. The last ground relied on is, that the appeals were discharged by the proceedings set forth in the record; and the cases of Ogden v. Saunders and Bergh and Zacarie v. Saunders, are relied on. The inference to be drawn from these decisions is directly the reverse; that aliens and citizens of other states are not bound by state insolvent or bankrupt proceedings, unless, as in the case of Clay, the creditor had made himself a party to the proceedings by appearing or accepting his dividend. But even admitting that the plaintiffs, as aliens, were bound by a regular proceeding under the state law, they are not bound by this.

The proceedings of Breedlove and Robeson are under the state law, passed 20th February 1817, 2 Lislet's Digest, 424.

That law has several essential provisions, which, before this court can confirm his discharge, must appear to have been complied with:

1. By the eighth section, the judge to whom application is made, must, after he is convinced that the formalities prescribed by the act have been complied with, order the creditors to be

called, in the manner and within the time directed for repeals by the Civil Code, art. 4, tit. 16, book 3; this reference is to the Civil Code then in force; but the same provisions have been transferred to the new code now before the court, and are found in article 3054; one part of which is, that "the creditors shall be summoned to attend by process, issued from the court, if the creditors live within the parish where the meeting shall take place." No such process appears by the record, yet the plaintiffs are admitted to have resided in the parish, and they excepted to the introduction of the insolvent proceedings, because they were not cited as parties (see bill of exceptions, p. 12).

This is a fatal error. There are many others.

2. The said law does not authorize any judgment of discharge from the debts, as is pronounced by the Parish judge, in the proceedings (p. 47), see sect. 28.

3. By the second section, the debtor is obliged to file with his proceedings an account of his losses. No such account appears in his proceedings.

4. By the seventh section, if the appraised value of the property surrendered do not amount to more than one third of the debts, he shall not receive the benefit of the act, unless the losses are proved by the oaths of two witnesses. There is no appraised property, and no oath to prove the losses.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This suit was instituted in the court of the United States for the eastern district of Louisiana, by Theodore Nicolet and J. J. Sigg, subjects of the republic of Switzerland, merchants and partners, trading under the firm of Theodore Nicolet & Co., against James W. Breedlove and William L. Robeson, members of a commercial company consisting of J. R. Bedford, James W. Breedlove and William L. Robeson, merchants and partners, formerly doing business under the firm of Bedford, Breedlove and Robeson.

The petition, which in the courts of Louisiana supplies the place of a declaration at common law, is founded on a promissory note in the following words:

[Breedlove and Robeson v. Nicolet and Sigg.]

$2964 10. *New Orleans, Nov. 22, 1826.*

Sixty days after date we promise to pay to order of Messrs Theodore Nicolet & Co. twenty-nine hundred sixty-four and ten hundredths dollars, value received.

BEDFORD, BREEDLOVE AND ROBESON.

In June 1829, the defendants filed their plea and answer, setting forth that after the execution of the said note, their affairs having become embarrassed, they made out a full and complete schedule, exhibiting all their property and the debts due to and from them, which said property was duly accepted by the judge of the Parish court for the benefit of the creditors placed on the said schedule, among whom were the plaintiffs Theodore Nicolet & Co., who were then and at the time of the execution of the said note, residents of New Orleans. The answer then sets forth at large the proceedings after the acceptance of the property, and the final discharge of the defendants by the judgment of the Parish court, given in pursuance of the laws of the state, which judgment they plead in bar of the action.

Afterwards, in January 1830, the cause came on for trial, when the following entry was made. "This cause came on for hearing before the court, when, after hearing the arguments of counsel in part, it is ordered that this cause be set for trial on the jury docket on the plea filed this day." And afterwards, on the same day, "came the defendants by their counsel and filed the following plea."

This plea objects to the jurisdiction of the court, because the note in the petition mentioned was drawn by Bedford, Breedlove and Robeson, payable to the order of Theodore Nicolet & Co.; which said firm of Theodore Nicolet & Co. is composed of other persons than the said Theodore Nicolet and the said J. J. Sigg: to wit, Germain Musson and others, all and each of whom are citizens of the United States and state of Louisiana.

The plea farther alleges, that Frederick Beckman, a remote indorser on the said note, had since the indorsement become a citizen. The plaintiffs objected to the reception of this plea to the jurisdiction, because it came too late.

Afterwards, in May 1830, the court, on a re-hearing, over-

ruled the plea to the jurisdiction which had been received at the January term. The defendants excepted to this decision.

The cause came on for trial before the court, a jury not having been required, when the following admissions were made.

"It is admitted that the persons composing the firm of T. Nicolet & Co. were residents of the state at the time of the execution of the note sued, and have continued so up to the present date; that they are, however, absent about six months in the year, but, when so absent, have their agents to attend to their business; and that their commercial house has existed in New Orleans ever since the execution of the said note. It is also admitted that, at the time of the execution of the said note, the defendants J. W. Breedlove and William L. Robeson were residents of the city of New Orleans, and citizens of the state of Louisiana."

These admissions are of no importance in the cause. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court.

The defendants offered in evidence the record of the bankrupt proceedings from the parish court. It was admitted that the meeting of the creditors was duly advertised in the public prints. The plaintiffs objected to the admission of this record, but the court determined that it should be read.

The defendants also gave in evidence the record of the proceedings of the court in a suit brought by the plaintiff, J. J. Sigg, on the same note, against Bedford, Breedlove and Robeson, to which the defendants, James W. Breedlove and William L. Robeson, appeared, and pleaded to the jurisdiction of the court, on which the suit was discontinued on motion of the plaintiffs' counsel.

In June 1830, the court rendered its judgment in favour of the plaintiffs for the amount of the note, with interest; which judgment is brought before this court by writ of error.

The plaintiffs assign the following errors in the proceedings of the district court.

1st. The action was irregularly instituted, no process having been sued out against Bedford, one of the partners, and the contract being joint as well as several.

2d. Neither in the petition, writ, or in any part of the proceedings, is the christian name of Sigg set forth.

3d. There is no evidence that the petitioners are aliens. They are shown to have been at the date of the note, and to the time of the trial, residents of New Orleans.

4th. If originally aliens, their residence in New Orleans renders them incapable of suing in the courts of the United States.

5th. There is no averment or proof that Bedford, one of the parties to the note, was subject to the jurisdiction of the court.

6th. The plea to the jurisdiction was properly filed, and ought not to have been taken from the files of the court.

7th. The plaintiffs being parties to the insolvent proceedings, were stopped from questioning the sufficiency of the discharge.

1. The first error assigned, that the suit is brought against two of three obligors, might be fatal at common law. But the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules.

The note being a commercial partnership contract, is what the law of Louisiana denotes a contract *in solido*, by which each party is bound severally as well as jointly, and may be sued severally or jointly. The Civil Code of Louisiana, article 2080, directs, "that in every suit on a joint contract all the obligors must be made defendants; and the succeeding article directs that "judgment must be rendered against each defendant separately, for his proportion of the debt or damages."

Article 2086 says, "there is an obligation *in solido* on the part of the debtors, where they are all obliged to the same thing, so that each may be compelled for the whole." Article 2088 says, "an obligation *in solido* is not presumed; it must be expressly stipulated."

This rule ceases to prevail only in cases where an obligation in solido takes place of right by virtue of some provisions of the law." Pothier, from whom this article appears to be taken, part 2, ch. 3, art. 8, gives, in number 266, as one of the instances in which the law presumes it, "where partners in commerce contract some obligation in respect of their joint concern."

This then is a contract in solido, on which the parties may

be sued severally or jointly, and by which each is liable for the whole.

The Civil Code, so far as we are informed, does not affirm or deny that a suit may be sustained on such a contract against two of three obligors. The rules of practice in Louisiana, so far as we understand them, require that the petition should state the truth of the case, and should show a right in the petitioner to recover. It is not denied that this petition states the case truly, nor is it denied that the petitioner has a right to recover from the defendants the sum demanded. It is alleged that he has not a right to recover it in the form of action which he has adopted. He might have obtained a judgment against each for the whole sum, but not, it is said, against two of them, in one action. If this be the rule of the common law, it is a mere technical rule, not supported by reason or convenience. No reason other than what is merely technical can be assigned for requiring the additional labour and expense of two actions for the attainment of that which may be as well attained by one. We have no reason for supposing that this technical principle has been engrafted on the civil law. The contrary is to be inferred from the practice of that branch of it with which we are familiar. It is a rule in chancery that all those against whom a decree can be made, shall be brought before the court, if they are within its jurisdiction. A court of equity, proceeding on the principles of the civil law, would not tolerate separate actions in this case. That court, in a case of which it would take cognizance, might require that all those bound in the note should be brought before it in the same suit, not that separate actions should be brought against those who might be sued in one. On the principles of the civil law it would seem that the defendants may be required to account for not joining the third promissor in the suit, not for joining two of them. The record contains ample evidence to this point.

In the bankrupt proceedings given in evidence by the defendants in the district court, the petitioners state John R. Bedford to be a resident of the state of Alabama, and the schedule required by law also states him to be of Alabama.

In the record of the proceedings brought by J. J. Sigg on the same note, against Bedford, Breedlove and Robeson, the defend-

ants pled to the jurisdiction of the court, and alleged in their plea that John R. Bedford, one of the members of the firm of Bedford, Breedlove and Robeson, was not a citizen of the state of Louisiana, but is an inhabitant and citizen of the state of Alabama. The suit was discontinued on the motion of the plaintiffs' counsel.

It was then fully shown to the court that Bedford could not have been joined in the action; and it has been repeatedly decided that in chancery, if the court can make a decree according to justice and equity between the parties before them, that decree shall not be withheld because a party out of its jurisdiction is not made a defendant, although he must have been united in the suit had he been within reach of the process of the court. In this case the judgment conforms to right and justice, since the plaintiffs were entitled to claim the full sum from each of the defendants.

In a question of doubtful practice, it ought not to be entirely disregarded, that the defendants in the district court have not taken this objection, though they pled to the jurisdiction of the court. 2 Pothier, p. 2, ch. 3, art. 8, no. 270, 271, would seem to indicate that more than one, and less than all the obligors, when bound in solido, may be joined in the same suit.

We think there was no error in joining two of the defendants in the same action.

2. The plaintiff Sigg is denominated in the petition and writ J. J. Sigg. The omission of his christian name, at full length, is alleged to be error. He may have had no christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the surname of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made, was not the partner of Theodore Nicolet & Co., advantage should have been taken of it sooner. It is now too late.

3. The petition avers that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they were citizens.

4. If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the constitution nor acts of congress re-

quire that aliens should reside abroad to entitle them to sue in the courts of the United States.

5. The suit not having been brought against Bedford, it was not necessary to aver or prove that he was subject to the jurisdiction of the courts of the United States.

6. The sixth objection is, that the plea to the jurisdiction was lawfully filed, and ought not to have been taken from the files of the court.

This plea was, that the firm of Theodore Nicolet & Co. consisted of other persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana.

It is admitted that a constitutional or legal disability in the court to exercise jurisdiction over the parties, may be taken advantage of by plea in abatement, but they must be parties. If they are not, the objection is of a different character. In the case at bar those persons who, if named as plaintiffs, might have ousted the jurisdiction of the court, were not plaintiffs. To make them so, was preliminary to any objection to them. The plea, therefore, was to be considered as objecting to the writ and petition, because all the members of the firm of Theodore Nicolet & Co. are not named. The incapacity of those members to sue, was to be considered after they became plaintiffs. If persons who ought to join in a suit do not join in it, the objection is not to the jurisdiction of the court on account of their invalidity to sue, but because the proper plaintiffs have not all united in the suit. The plea is to be considered as if the averment that Germain Musson and others were citizens of Louisiana, had not been contained in it.

This plea was offered after issue was joined on a plea in bar, and the argument of the cause had commenced. The court might admit it, and the court might also reject it. It was in the discretion of the court to allow or refuse this additional plea. As it did not go to the merits of the case, the court would undoubtedly have acted rightly in rejecting it. But it was received, and the question is, whether, after its reception, all power over it was terminated.

All the proceedings are supposed to be within the control of the court while they are in paper, and before *a jury is sworn* or

a judgment given. If so, the orders made may be revised, and such as in the judgment of the court may have been irregularly or improperly made, may be set aside. If such be the discretion of the court, this is not a case in which a supervising tribunal will control that discretion. The court very properly thought that after issue was joined and the argument commenced, an additional plea not going to the merits, but which might defeat the action, ought not to have been received. We are not prepared to say, they exceeded their power in correcting this order and setting it aside. If they did not exceed their power, they have committed no error in this exercise of it.

7. The seventh and last error assigned is, that the plaintiffs, being parties to the insolvent proceedings, were stopped from questioning the sufficiency of the discharge.

The act of Louisiana, passed on the 20th of February 1817, section 8, relative to the voluntary surrender of property, and to the mode of proceeding, &c. directs when the judge shall be satisfied that the debtor is entitled to the benefit of the act, "he shall order that the creditors of said debtor be called in the manner and within the time prescribed for respites by the Civil Code, art. 4, title 16, book 3; and he shall appoint a counsellor to represent the creditors absent or residing out of the state, if there be any mentioned in the schedule."

The provision referred to, is in title 18, articles 3052, 3053, 3054, in the volume in possession of the court.

The language of the code is, "the respite is either voluntary or forced. It is voluntary when all the creditors consent, &c."

"It is forced when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law."

The forced respite takes place when the creditors do not all agree, for then the opinion of the three-fourths, in number and in amount, prevails over that of the creditors forming the other fourth, and the judge shall approve such opinion, and it shall be binding on the other creditors who did not agree to it.

But in order that a respite may produce that effect, it is necessary,

1. That the debtor should deposit, &c.

2. That a meeting of the creditors of such debtor, domiciliated in the state, shall be called on a certain day at the office of a notary public by order of the judge, at which meeting the creditors shall be summoned to attend, by process issued from the court, if the creditors live within the parish where the meeting shall take place, or by letters addressed to them by the notary, if they are not residing in the parish.

It is further directed that the meeting, as well as its object, be advertised in English and in French.

It was admitted that this advertisement was made; but it is not admitted nor proved that the petitioners were summoned to attend by process from the court, or by letters addressed to them by the notary. Nor did they appear voluntarily.

Is the judgment binding on them?

It is unquestionable that summary proceedings of this description must be regular, and that their regularity must be shown by the party who relies on them. Notice to the creditors is material, and the law prescribes that notice and defines it. Advertisement in the papers is not sufficient. Personal notice must be given to a resident within the parish, by process; to a non-resident, by a letter from the notary. The law deems this notice indispensable, and the court cannot dispense with it. For want of it the judgment of discharge was no bar to this action.

There are other irregularities in the proceedings, but want of notice is fatal, and it is unnecessary to notice them.

Judgment affirmed, with costs and damages, at the rate of six per cent per annum.

Abner L. Duncan's Heirs and Representatives, plaintiffs in error v. The United States.

Action on a bond executed by William Carson, as paymaster, and signed by A. L. Duncan and John Carson as his sureties, conditioned that William Carson, paymaster for the United States, should perform the duties of that office within the district of Orleans. The breach alleged was that W. C. had received large sums of money in his official capacity, in his life time, which he had refused to pay into the treasury of the United States.

The bond was drawn in the names of Abner L. Duncan, John Carson and Thomas Duncan as sureties for William Carson, but was not executed by Thomas Duncan. There were no witnesses to the bond, but it was acknowledged by all the parties to it before a notary public. The defendants, the heirs and representatives of A. L. Duncan, in answer to a petition to compel the payment of the bond, say that it was stipulated and understood, when the bond was executed, that one Thomas Duncan should sign it, which was never done, and the bond was never completed; and therefore A. L. Duncan was never bound by it: they also say, that, as the representatives of A. L. Duncan, they are not liable for the alleged defalcation of William Carson, because he acted as paymaster out of the limits of the district of Louisiana; and the deficiencies, if any, occurred without the limits of the said district.

Before the jury were sworn the defendants offered a statement to the court for the purpose of obtaining a special verdict on the facts, according to the provisions of the act of the legislature of Louisiana of 1818. The court would not suffer the same to be given to the jury for a special finding, because it "was contrary to the practice of the court to compel a jury to find a special verdict."

The judge charged the jury that the bond sued upon was not to be governed by the laws of Louisiana in force when the bond was signed at New Orleans, but that this and all similar bonds must be considered as having been executed at the seat of the government of the United States, and to be governed by the principles of the common law; that although the copy of the bond sued on, which was certified from the treasury department, exhibited a scrawl instead of a seal, yet they had a right to presume that the original bond had been executed according to law; and that in the absence of all proof as to the limits of the district of New Orleans, the jury was bound to presume that the defalcation occurred within the district; and if the paymaster acted beyond the limits of the district, it was incumbent on the defendants to prove the fact: held, that there was no error in these decisions of the district court of Louisiana.

This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed; and also the

manner in which its obligations should be enforced. It was delivered to the treasury department at Washington; and to the treasury, did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the federal government cannot be questioned. It has the power of prescribing under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government; and, in contemplation of law, at the place where its principal powers are exercised.

It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court. In this case it appears that the Louisiana law, which regulated the practice of the district court of Louisiana, has not only been repealed, but the record shows that in the year 1830, when the decision was given in this case, there was no such practice of the court, as was adopted by the act of congress of 26 May 1824. The court refused the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court."

By the court. On a question of practice, it would seem that the decision of the district court as to what the practice is should be conclusive. The practice of the court cannot be better known and established than by its own solemn adjudications on the subject.

IN error from the district court of the United States for the eastern district of Louisiana.

On the 22d November 1829, the district attorney of the United States filed, on behalf of the United States, a petition stating that on the 4th of March 1807, William Carson, Abner L. Duncan and John Carson made and executed their bond to the United States in the sum of ten thousand dollars, by which they bound themselves and each of them, and either of their heirs, executors and administrators, that William Carson, paymaster of the United States, should well and truly perform and discharge, according to law, the duties of the office of paymaster of the United States, within the district of New Orleans.

The petition alleged a breach of this bond by William Carson, paymaster, in having received in his life time large sums of money in that capacity, which he refused to pay into the treasury of the United States. And also that Abner L. Duncan has deceased, leaving property, and that, by reason of the facts above stated, his heirs, to wit, John N. Duncan, Frances

Duncan, wife of Frederic Conrad, Hannah Duncan, Eliza Duncan, and Abner Duncan, all children of the said Abner L. Duncan, these three last named being minors, and also Frances S. Duncan, wife of the said Abner L. Duncan, who has accepted the community of her deceased husband, have become liable to pay, and are indebted to the United States, jointly and severally, in the sum of ten thousand dollars. The petition proceeds to pray that John N. Duncan and Frances S. Duncan, and the aforesaid minors Hannah, Eliza, and Abner Duncan, their tutors and curators, be cited to answer the petition, and that, after due proceedings had, they may have judgment against them, jointly and severally, for the sum of ten thousand dollars, with interest and costs.

To this petition was annexed a copy of the bond, as follows:

"Know all men by these presents, that we, William Carson, paymaster for the United States of America, within the district of New Orleans, Abner L. Duncan, John Carson, and Thomas Duncan, Esquires, are held and firmly bound unto the said United States in the penal sum of ten thousand dollars, money of the United States, to be paid to the said United States of America, for which payment well and truly to be made we bind ourselves, and each of us, by himself, our and either of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this fourth day of March one thousand eight hundred and seven.

"The condition of this obligation is such, that if the above bounden William Carson, paymaster for the United States of America, do and shall well and truly, according to law, perform and discharge the duties of said office of paymaster for the United States of America within the district of Orleans, then the above obligation to be null and void, otherwise to remain in full force and virtue.

WILLIAM CARSON, [SCRAWL].
A. L. DUNCAN, [SCRAWL].
JOHN CARSON, [SCRAWL]."

The bond was acknowledged by William Carson and Abner L. Duncan, before a notary public in New Orleans, on the 4th day of March 1807, and by John Carson, before a notary

public at Harrisburg, Pennsylvania, on the 21st day of May 1807. The copy of the bond was certified according to the provisions of the act of congress of 3d of March 1817, entitled "an act providing for the prompt settlement of accounts."

To the petition of the United States, the heirs and representatives of Abner L. Duncan, filed an answer on the 14th day of December 1829, in which all the allegations in the petition were denied, except that Abner L. Duncan did sign the bond therein referred to; but they aver that said Duncan was not, in his life time, nor are the respondents, bound in law to pay the amount thereof, nor any part thereof.

They further aver, that by and in said bond, it was stipulated and understood (when the same was signed by the said Abner L. Duncan, as security for said Carson), that one Thomas Duncan should also sign the same, as his co-surety, but that the said Thomas Duncan never did sign the same, and said bond never was completed, nor was said Abner L. Duncan ever bound thereby.

Afterwards, on the 26th of May 1830, an amended answer was filed, stating that the respondents are not liable for the alleged defalcation in the accounts of said Carson, because said Carson acted as paymaster out of the limits of the district of Louisiana, and the said deficiencies, if any exist, occurred without the limits of said district.

The cause came on for trial upon these pleadings on the 29th day of May 1830; and before the jury were sworn, the counsel for the defendants offered to the court, a statement of the facts, for the purpose of obtaining a special verdict on the facts, under the tenth section of the act of the legislature of the state of Louisiana of 1817, page 32. This being opposed by the district attorney, the court refused to admit the same, or to suffer the same to be given to the jury for a special finding, "because such was contrary to the practice of this court; and because a jury ought not to be compelled to find a special verdict." Whereupon, the counsel for the defendants excepted to the opinion and decision of the court therein, before the jury were sworn.

On the trial of the cause, a transcript from the treasury department of the accounts of William Carson as paymaster,

was given in evidence, showing a balance due to the United States, of six thousand one hundred and twenty-six dollars eleven cents, for which sum a verdict was given, and a judgment thereon rendered in favour of the United States.

On the trial the defendants took the following bill of exceptions.

"Be it remembered, that, on the trial of this cause, the judge charged the jury that the bond sued on was not to be governed by the laws of Louisiana, or those in force in the territory of Orleans at the time said bond was signed by Abner L. Duncan, who signed it in New Orleans in the then said territory; but that this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of a common law, to wit, the common law of England.

"The judge further charged the jury that, although the copy of the bond sued on exhibited a scrawl instead of a seal, yet they had a right to presume that the original bond had been executed according to law, to wit, that it was sealed in the manner prescribed by the common law; that the scrawl in the copy represented the place of the seal as plainly as could be done without a fac simile; and that if the fact was otherwise, it was in the power of the defendants to have shown it.

"The judge also charged the jury that they were bound to presume, in the absence of all proof as to the limits of the district of Orleans, that the deficiency in the accounts of Carson (hereunto annexed), the principal obligor on said bond, occurred on account of moneys received and disbursed as paymaster of the district of Orleans, although it was proved that said Carson had acted as paymaster, and disbursed moneys, as such, at fort Stoddart, and at the town of Washington, both in the then territory of Mississippi, and finally, that if said Carson disbursed money in any other district than that of Orleans, it was incumbent on the defendants to prove that fact. The judge further charged that the possession of the bond by the treasury department, was prima facie evidence of delivery. To all of which charges, the counsel for the defendants then and there excepted, before the jury retired to consider their verdict."

The defendants prosecuted a writ of error to this court: and the record presented the bills of exceptions to the ruling of the district court, as to the claim to have a special verdict; and the matters which the defendants' counsel offered for the jury to find as such; and also the bill of exceptions sealed by the court on the trial of the cause.

The case came on for argument at the January term of this court in 1832, and was held under advisement. It was in part reargued at this term.

Mr C. J. Ingersoll, for the plaintiffs in error, contended:

1. It was an error in the court below to reject the practice of the state and substitute the common law of England. The practice of the state was established by the act of 1817, adopted and made the law of the court of the United States by the act of congress of the 26th of May 1824. 3 Laws U. S. by Story, 1791. The case of Parsons v. Bedford, 3 Peters, 445, settles the principle. The cases of Parsons v. Armor, 3 Peters, 413, and Parsons v. Bedford, before cited, settle every thing but the mere application of their principles to any given circumstance; and it is clear that the district court of Louisiana has established no practice of its own; which, if so, must appear judicially and declaratorily. It is true that the act of Louisiana of 1817 was repealed by the act of 1825, establishing a different code of practice. Which practice then is to prevail? that of 1817 or that of 1825? Certainly the former, because that was sanctioned by the act of congress of 1824; and when state practice is once adopted by a federal court, it never fluctuates according to the practice or legislation of the state, but remains fixed, till changed by the rule of the federal court, or by act of congress. It is the same case in principle as that of the old states under the judiciary act of 1789: they took the state practice, as existing then, and have never followed any state change since. Wayman v. Southard, 10 Wheat. 1. The power of regulating process in the federal courts is exclusively federal: it abides in congress, until by them delegated, as far as necessary, to the federal courts. The second section of the act of congress of the 8th of May 1792, 1 Story's Laws U. S. 257, enacts that the modes of proceeding shall be the same as

were then used pursuant to the act of 1789. Infinite confusion would ensue, and the supreme power would be subverted, if the states were allowed to alter the practice of the federal courts. The case of Fullerton v. The Bank of the United States, 1 Peters, 604, shows how the federal court for Ohio, admitted into the union in 1802, adopted the state practice. So the federal court of Louisiana might adopt the state practice; but not having done so expressly, or by affirmative regulation, the practice first used, that of 1817, became its permanent practice, and could not be affected by the state code of practice of 1825. For this is not a question of right, falling under the decision of Cox v. The United States, 6 Peters, 203; but a question of remedy. The common law does not apply, but the law of Louisiana, which is the place of suit; and as was ruled by Judge Washington, state laws qualify rights, but have no influence on remedies in the federal courts. Campbell v. Claudius, 1 Wash. C. C. Rep. 485. The only question is, which of the remedies is the proper one: and it is submitted that the state practice, first sanctioned by act of congress, and applied in the federal court, remains the practice of that court till changed by its own regulation, or act of congress.

2. Duncan's heirs are not liable, because it is not his bond, as they pleaded. The body of the bond proves that Thomas Duncan was, by the contract, to share its responsibility with Abner Duncan, and without the signature of Thomas it never was completed or delivered, but remains an escrow. It may be good against Carson, but not against Duncan. The very point has been adjudged in the supreme court of Louisiana, in the case of Wells v. Dill, 1 Martin's Rep. N. S. 592. Pothier, as there cited, shows this to be a principle of law. It is a question of contract, how far the surety's liability extends. Craythorne v. Swinburn, 14 Ves. 166. The case of Leaf v. Gibbs, 4 Car. & Pay. 466, 19 English Common Law Reports, 475, is a case at common law, precisely in point. And the case of Pawling v. The United States, 4 Cranch, 219, is an analogous adjudication, which rules the principle, if not the very point. The bond is not joint and several, but a joint obligation: "we bind ourselves and each of us by these presents:" and the principle of joint liability is among the rudiments of the

common law, from the very commencement of the contract to execution upon it by final process. Judgment against three, will not bear execution against any one of them. Clerk v. Clement, Roll. Ab. 888; 6 Term Rep. 525. Judgment against two defendants will not even bear ca. sa. against one, and elegit against another. Blumfield v. Roswith, Cooke's Eliz. 573; 5 Co. 86; Whitaker v. Hankinson, Cro. Car. 73; Barton v. Pettit, 7 Cranch, 288, 2 Cond. Rep. 494.

3. Duncan's heirs are not answerable, because he became surety, at all events, for no more than the district of Orleans; and Carson's delinquency, if any, occurred beyond that district. The bond is explicitly confined in terms to the district of Orleans. Carson's appointment as paymaster was regulated by the act of congress of the 14th of March 1802, by the third section of which, each paymaster is allotted to a localized district, and by the sixteenth section the paymaster-general, who is to appoint the paymasters, and require them to give bond with surety, is to appropriate each one to a defined district. 3 Story's Laws U. S. 451. It is well settled that suretyship for one place, does not cover delinquencies in another. Miller v. Stewart, 9 Wheat. 630; United States v. Kirkpatrick, 9 Wheat. 720. Now the account in proof is unlimited; it is against Carson as paymaster, without designating any district. The only credit is for a sum recovered of Carson's administrator in Mississippi. The charge is, that although it was proved that Carson disbursed as paymaster in Mississippi, yet in the absence of all proof as to the limits of the district of Orleans, the jury must presume that the deficiency occurred in that district, which takes for granted that Carson did disburse as paymaster in Mississippi. Thus all districts are confounded, without regard to the act of congress, or the bond in this case, and the surety is made to answer for every district in the union.

Mr Taney, attorney-general, admitted,

That by the act of congress of 1824, the courts of the United States in the district of Louisiana, were authorized to modify the practice of those courts, and to arrange the same differently from the practice in the state courts, if the same should be deemed proper. In 1824, the law of Louisiana of 1817, au-

thorizing a special finding by a jury, was in force: but in 1825, "The Code of Practice" of the courts of Louisiana was adopted and promulgated, by which the right of a party to insist on a special verdict was taken away, and the proceedings in jury trials were left to the rules of the common law.

It was in the exercise of the powers granted to the judges of the courts of the United States by the act of 1824, that the practice of adopting the rules of the common law in jury trials was adopted by the court; and that the practice of a special finding did not prevail, is sufficiently shown by the court saying that the mode of proceeding demanded "was contrary to the practice in the district court of the United States." The declaration of the judge of the district court is evidence of the rule; as it is not required that the rule should have been in writing.

To maintain the exception taken by the counsel for the plaintiffs in error, it should be shown that by the act of congress it was the duty of the courts of the United States to adopt the practice of the state courts, as it stood at the passage of that law. If they had the power to reject any part of it; or if they had the power to change the practice, as it might be changed in the state courts, the exception fails. Both these powers must be denied to have existed in the court, in order to render the refusal of the district judge error.

As the act of 1824 is in substance and effect the same with the act of May 8th, 1792, the interpretation given of the latter act will assist in the construction of the former law.

It has been decided that under the act of 1792, the powers of the courts of the United States could be exercised to change the modes of proceeding and establish them according to the rules these courts might adopt. Bank U. S. v. Halstead 10 Wheat. 51, 60, 61.

The language of the act of 1824, is different from that of 1792, inasmuch as in reference to the adoption of the state practice, the words "now used," are omitted; thus showing that it was the intention of the legislature to authorize a change of the practice in the courts of the United States, as changes might be made in the state courts, should the judges of these courts approve of the same. The new code of practice was

about to be adopted; and as it was regarded as an improvement, the courts of the United States were left at liberty to adopt it with such modifications as they thought proper. It was in the power of the district court to adopt the practice established by that code, and it has adopted it. Cited 3 Peters, 443, 1 Cond. Rep. 141.

If the act of 1824 required that the courts of the United States should adopt the practice of the courts of Louisiana as *then* established, the law would have been unconstitutional. The law of Louisiana of 1817, as it took away the right of trial by jury, was void. The right of the jury to give a general verdict is an essential and most important ingredient in the trial by jury; it is as much a part of the law of the trial by jury, as their number and unanimity; and a court is bound to receive a general verdict if the jury offer to find generally. The right to trial by jury, as the same is used and exercised at common law, is secured to every citizen of the United States by the constitution, both in civil and criminal cases. Amendments to the Constitution, art. 5, 6; 2 Dallas, 309.

But if congress had the power to legislate on this subject, and it is not denied that such right existed, they have, by the act of 1789, directed the mode of trial by jury in the district and circuit courts; and when by that act that mode of trial is directed, the powers and principles which belong to it at common law are given.

It was to prevent any discrepancy between the constitution and laws of the United States, and the law and practice of Louisiana, that the power to modify this practice was given to the court, and that power has been employed. 3 Peters, 425, 445.

As to the position assumed by the counsel for the plaintiffs in error, that the law of Louisiana is different from the common law as to the liabilities of sureties in a bond and the remedies against them; the decision of this court in the case of Cox and Dick v. The United States, 6 Peters, 171, has settled the law of the contract to be against the plaintiffs. The contract entered into by those who executed this bond, is governed by the law of the district of Columbia, in which, at the treasury department, the paymaster was bound to account.

In reference to the objection taken to the copy of the bond having a scrawl in place of a seal, it was argued that had the original instrument been executed in that form, it would have been sufficient. 1 Stark. Ev. 333, note 1. But this inquiry is rendered unimportant, as the certificate from the treasury department fully authenticates the copy.

There is no evidence that William Carson was the paymaster of any other district than the district of Orleans; nor what were the limits of that district. The military pay districts were not regulated by any particular territorial divisions, but were assigned by the president. Act of congress of March 16, 1802.

The only appointment held by William Carson, was that mentioned in the bond, and under that appointment the money was advanced to him; and if his payments were rightfully made they were made within his district; if out of it and made wrongfully, his sureties are answerable for the mis-appropriation. If the principal in the bond had any other appointment, it was the duty of the defendants in the court below to have shown the same.

The possession of the bond by the proper officers of the government of the United States is sufficient, in the absence of contrary proof of the delivery of the bond. Had it been held as an escrow, until Thomas Duncan had executed it, this should have been made out by evidence. Bank U. S. v. Dandridge, 12 Wheat. 64; Union Bank v. Ridgely, 1 Har. and Gill, 430.

Mr Justice M'Lean delivered the opinion of the Court.

This writ of error is prosecuted to reverse a judgment of the district court, which exercises circuit court powers, in the state of Louisiana.

In the year 1829 an action was commenced by the United States against the plaintiffs in error, on a bond given by William Carson, as paymaster, and signed by A. L. Duncan and John Carson as his sureties. The bond bears date the 4th day of March 1807, and contains a condition "that, if the above bounden William Carson, paymaster for the United States of America, do and shall well and truly, according to law, perform

and discharge the duties of said office of paymaster, &c. within the district of Orleans, then the obligation to be void," &c.

The breach alleged in the petition was, that William Carson, paymaster, &c., "has not well and truly, according to law, discharged and performed the duties of said office for the district of Orleans; but that, on the contrary, he did, in his life time, receive large sums of money in his capacity aforesaid, which, although frequently requested, he refused to pay into the treasury of the United States."

The defendants in their answer say, that "by and in said bond, it was stipulated and understood, when the same was signed by Abner L. Duncan, as security for said Carson, that one Thomas Duncan should also sign the same, as his co-surety, but that the said Thomas Duncan never did sign the same, and said bond never was completed, nor was said A. L. Duncan ever bound thereby." They also aver that they are not liable for the alleged defalcation in the accounts of said Carson, because he acted as paymaster out of the limits of the district of Louisiana, and the said deficiencies, if any exist, occurred without the limits of said district.

Before the jury were sworn, the defendants offered a statement to the court, for the purpose of obtaining a special verdict on the facts, in pursuance of the provisions of the tenth section of a statute of Louisiana, passed in 1817. But the court overruled the statement, and would not suffer the same to be given to the jury, for a special finding, because it was contrary to the practice of the court to compel a jury to find a special verdict. To this decision an exception was taken.

A transcript of the accounts of Carson, duly certified by the treasury department, was then given in evidence to the jury; and the judge charged the jury, that the bond sued on was not to be governed by the laws of Louisiana, or those in force in the territory of Orleans, at the time said bond was signed by A. L. Duncan, who signed it in New Orleans, in the then said territory; but that this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of the common law. That although the copy of the bond sued on exhibited a scrawl instead of a seal, yet they had a right to

presume that the original bond had been executed according to law. That the jury were bound to presume, in the absence of all proof as to the limits of the district of Orleans, that the defalcation of Carson occurred in the district of Orleans, although it was proved that he disbursed moneys, as paymaster, at fort Stoddart and at Washington, in the territory of Mississippi; and that if the defendant Carson had acted as paymaster beyond the limits of the district of Orleans, it was incumbent on the defendants to prove the fact. And the judge also charged the jury, that the possession of the bond by the treasury department was prima facie evidence of delivery—to which charge exceptions were taken.

The jury rendered a verdict against the defendants, for six thousand one hundred and twenty-six dollars, with interest, &c.

This judgment the plaintiffs in error pray may be reversed, on the following grounds:

1. Because the surety, Abner L. Duncan, is not bound; as when he executed the bond, it was agreed that it should also be signed by Thomas Duncan.

2. Because William Carson was appointed paymaster for a certain district, and the judgment covers defalcations, which may have occurred out of such district.

3. The rejection by the court of the statement of facts, on which a special verdict was prayed.

4. Because the rejection of this statement precluded the defendants from proving that the bond was delivered as an escrow.

As to the first error assigned, it appears, on an inspection of the bond, it was drawn in the names of Abner L. Duncan, John Carson, and Thomas Duncan, as sureties for William Carson, but that Thomas Duncan never signed it. There are no witnesses to the bond, but, on the day of its date, it was acknowledged by William Carson and Abner L. Duncan, before a notary public at New Orleans, and on the 21st day of May following, John Carson acknowledged it before a notary public at Harrisburgh, in Pennsylvania.

To sustain this ground, reference is made to a decision of the supreme court of Louisiana in the case of Wells v. Dill, reported in 1 Martin, 592. In their decision, the court say, that,

"the defendant is sued on the ground that he signed as surety, an instrument, purporting to be a bond, signed by Charles Blanchard, for his faithful performance of the duties of curator, to the vacant estate of one Jared Risdon, deceased. In opposition to this action, the defendant relies, principally, on the want of the signature of another person to the instrument, whose name is mentioned in the body of it as co-surety. The bond is drawn in the name of Charles R. Blanchard, as principal, and the defendant and Walter Turnbull as sureties. At the bottom, the names of Blanchard and Dill are affixed; that of Turnbull is wanting. We agree with the defendant, that, under these circumstances, his signature to the obligation does not bind him. The contract is incomplete, until all the parties contemplated to join in its execution affix their names to it, and while in this state cannot be enforced against any one of them. The law presumes that the party signing did so, upon the condition that the other obligors named in the instrument should sign it: and their failure to comply with their agreement gives him a right to retract." Pothier is cited by the court to sustain this principle.

There can be no doubt, that under the civil law, the principle is correctly stated by the court. It must be observed, however, that the court say, the want of Turnbull's signature was principally relied on to invalidate the bond; so that there seems to have been no circumstances going to refute the presumption against its validity, arising from its face; and that the omission of the signature, was not the only ground of objection to it.

It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen. And if it appeared in the present case, that Abner L. Duncan signed the bond, to be delivered on condition that Thomas Duncan should execute it, there can be no doubt the plea should have been sustained in the court below. But the delivery of the bond, as well as the signatures of the parties, is a question of fact for the jury; and this court cannot determine the legal question arising on

such fact, unless it be stated in a bill of exceptions. The acknowledgement of the bond by Abner L. Duncan, and afterwards by John Carson, unconditionally, and its delivery to the government, would seem to rebut the inference drawn by the plaintiffs against its validity, from the simple fact of its not having been signed by Thomas Duncan. There is, therefore, nothing upon the face of the record which would go to destroy the validity of this bond.

A question was raised, and elaborately argued by the counsel for the plaintiffs, whether this bond, having been executed at New Orleans, was not governed, not only as to the manner of its execution, but also as to the extent of the obligations incurred under it, by the principles of the civil law. In the case of Cox et al. v. The United States, decided at the last term, this question was settled.

This is an official bond, and was given in pursuance of a law of the United States. By this law the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington, and to the treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers, exercised by the federal government, cannot be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases, the local law cannot affect the contract; as it is made with the government, and in contemplation of law, at the place where its principal powers are exercised.

As there was no evidence before the jury that any part of the defalcation of the paymaster occurred without the limits of the district in which, as appears by the bond, he was to act; the court below might well instruct the jury, that in the absence of such proof, they were bound to presume that the deficiency took place within the district.

The rejection of the special verdict by the court, is the ground which seems most to be relied on for a reversal of this judgment.

In 1817 the legislature of Louisiana enacted, that "in every case to be tried by a jury, if one of the parties demands that

the facts set forth in the petition and answer should be submitted to the said jury, to have a special verdict thereon, both parties shall proceed, before the jury are sworn, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the counsel and signed by the judge, and the jury shall be sworn to decide the question of fact or facts so alleged and denied," &c.

On the 26th of May 1824, congress passed an act entitled "an act to regulate the practice in the courts of the United States for the district of Louisiana; in which it is provided, that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of said state: provided that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States."

This section was a virtual repeal, within the state of Louisiana, of all previous acts of congress which regulated the practice of the courts of the United States, and which came within its purview. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge of the United States might deem necessary, to conform to the organization of the district court, and avoid any discrepancy with the laws of the union.

By a code of the Louisiana legislature, passed in 1829, called the "Code of Procedure," the act of 1817 was repealed. This repealing act was not before the court until the present session; and a question is made under it, whether it does not, by virtue of the act of congress of 1824, change the practice of the district court. It is insisted, for the plaintiffs, that it could not have been the intention of congress, by the act of 1824, to subject the practice of the district court in Louisiana to any changes which the legislature of that state might adopt, in reference to the practice of the state courts: and the con-

struction which has been given to the act of 1792, which regulates process in the courts of the United States, is relied on as conclusive on the point. This act, by re-enacting the act of 1789, adopted the "modes of process" for the district and circuit courts, which were in use at the time of its passage in the supreme courts of the respective states, but did not require, as this court have decided, a conformity to the changes which might be made in the process of those courts. Nor did the act apply to those states which were subsequently admitted into the union. But this defect was removed by the act of the 19th of May 1828, which placed all the courts of the United States on the same footing in this respect, except such as are held in the state of Louisiana.

It does not appear that the district court of Louisiana, by the adoption of any written rule, has altered the practice which this court, in the case of Parsons v. Armor and Oakey, and Parsons v. Bedford and others, reported in 3 Peters, considered as having been adopted by the act of 1824. But, if the questions raised in these cases occurred after the act of 1817 was repealed by the code of procedure, in 1829, the fact was not known to the court. As the act of 1824 adopted the practice of the state courts before this court could sanction a disregard of such practice, it must appear, that, by an exercise of the power of the district court, or by some other means, the practice had been altered.

It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years, and this forms the law of the court.

In the case under consideration, it appears that the Louisiana law, which regulated the practice of the district court of Louisiana, has not only been repealed; but the record shows, that in the year 1830, when the decision objected to was made, there was no such practice of the court as was adopted by the act of 1824. The court refused to suffer the statement of facts to go to the jury for a special finding, because they say, "such was contrary to the practice of the court."

On a question of practice, under the circumstances of this case, it would seem, that the decision of the district court, as

above made, should be conclusive. How can the practice of the court be better known or established, than by its own solemn adjudication on the subject?

In regard to the last error assigned, it is not perceived how the refusal of the special verdict precluded the defendants from proving that the bond was delivered as an escrow. Such evidence was admissible under the plea or answer of the defendants; but it does not appear that any such was offered and rejected by the court.

The judgment of the district court must be affirmed, with costs.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: on consideration whereof it is ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

IN THE MATTER OF THE UNITED STATES v. EIGHTY-FOUR BOXES OF SUGAR, TUFTS AND CLARKE CLAIMANTS.

The claimants of eighty-four boxes of sugar, seized in the port of New Orleans, for an alleged breach of the revenue laws, and condemned as forfeited to the United States for having been entered as brown instead of white sugar, claimed an appeal from the district court of the United States to the supreme court. The sugars, while under seizure, were appraised at two thousand six hundred and two dollars and fifty-one cents; and after condemnation they were sold for two thousand three hundred and thirty-eight dollars and forty-eight cents; leaving, after deducting the expenses and costs of sale, the sum of two thousand one hundred and fifty dollars and six cents. The duties on the sugars, considering them as white or brown, being deducted from the amount, reduced the net proceeds below two thousand dollars, the amount upon which an appeal could be taken. Held, that the value in controversy was the value of the property at the time of the seizure, exclusive of the duties, and that the claimant had a right to appeal to this court.

The statute under which these sugars were seized and condemned, is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If either through accident or mistake the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred.

FROM the district court of the district of East Louisiana.

In the port of New Orleans, eighty-four boxes of sugar, imported from Matanzas, were entered as *brown sugar*, and were seized by the officers of the customs for having been so entered, the same being alleged to be *white sugar*, and therefore forfeited to the United States; a libel was filed against the whole importation, but afterwards a part of the cargo was released, and the proceedings in the libel were against the remaining eighty-four boxes. The whole parcel had consisted of one hundred and fifty-five boxes, of which seventy-one were marked B, and eighty-four marked C. The seventy-one boxes released were marked C, and of the eighty-four remaining, seventy were marked B, and fourteen were marked C.

In the answer of the claimants, all fraudulent intention is denied, and the character of the sugar, as entered, is asserted;

and the claimants also allege, that if the contrary shall be adjudged by the court, the just conclusion should be that a mistake has been committed, and not that a fraud was meditated.

The sugars while under seizure were appraised by two officers of the customs at two thousand six hundred and two dollars fifty-one cents. After their condemnation they were sold by the marshal of the United States at a public sale for two thousand three hundred and thirty-eight dollars forty-eight cents, leaving two thousand one hundred and fifty dollars six cents after deducting the costs and the charges attending the suit and sale. Upon the sugars whether *white* or *brown*, the duties amounted to a sum sufficient to reduce the net proceeds below two thousand dollars; considering the sugars as white sugars these proceeds would be one thousand three hundred and eighty-eight dollars thirty-six cents.

Testimony was taken as to the real nature and description of the sugars, all of which was set forth in the record of the proceedings in the district court, and which is particularly referred to in the opinion of this court. The district court condemned the sugars as forfeited to the United States, for having been entered under a false denomination; the entry stating them to have been brown sugars, and the court having adjudged them to have been white sugars.

The claimants prayed an appeal, which the district court refused to allow, taking the ground that the value of the property in dispute was not above two thousand dollars: and insisting, that to ascertain the value, the duties must be deducted from the amount of sales, which deduction would leave a sum much below two thousand dollars.

Upon this refusal, notice was given to the district judge and district attorney, of an application to this court for a mandamus, for the allowance of the appeal. And the case came before the court upon a motion for such a mandamus. The record in court being full, it was, to avoid delay, agreed that if this court shall consider that the case admits of an appeal, it may, on the present transcript, proceed to decide the merits of the cause.

The case was argued by Mr Mayer, for the appellants; and by Mr Taney, attorney-general, for the United States.

For the appellants, Mr Mayer contended.

1. That the value of the property in suit, in reference to the right of appeal, is the amount of money into which it is convertible; and that the sales made in this case, are the best test of the value of the sugar, and decide the value of property in dispute to be above two thousand dollars; that in such a case, to learn the value, the court ought not to make any deduction for the amount of duties—a subject, as regards value, entirely collateral to the goods; the productive capacity of the goods to yield the amount for paying the duties, being, in itself, a part of their essential value.

On the merits, he contended:

1. That the testimony shows that the sugars ought to be considered brown.

2. That whether adjudged brown or white, there is no ground for forfeiture of the sugars; the testimony exhibiting justification for a belief that the sugars should be, or might be, denominated brown; and the court's opinion, if to the contrary, only settling a doubt, and at most establishing an error of judgment, and not a wilful deception.

That no presumption of fraudulent representation necessarily arises from showing a specification of an entry to be incorrect in regard to the commercial character or designation of an article, when that incident of the article is speculative, or may be variously interpreted, or when, at all events, as in this case, it is variously defined by the opinions and experience of commercial witnesses.

3. That the testimony of the custom house officers is incompetent; that it is inadmissible, at least as to declarations of Mr Tufts; and that, under any view, it is entitled to but little weight, since it must have been governed by the prepossessions which led them to seize the sugar, and comes in aid of their act of seizure

On the point of jurisdiction, Mr Mayer argued, that the value of the property in question, in reference to the right of

appeal, is commensurate with the party's interest, and is the amount of money into which the subject matter is convertible; that the sales made in this case, are the best test of the value of the sugar, and decide the value of property in dispute to be above two thousand dollars; that, to learn the value, the court ought not to make any deduction for the amount of duties, a subject, as regards value, entirely collateral to the goods; the *productive capacity* of the goods to yield the amount for *paying the duties themselves* being *in itself* a part of their essential value. The lien of the United States on imported goods for the duties gives the government no *property* in them, and does not impair in any degree the proprietary interest of the individual throughout the whole property. No lien would have such an effect in regard to the owner's interest; but the lien for duties is not one of as proprietary a character as the lien of mortgage, or a sailor's lien, or a judicial lien of any kind. The existence of the lien in no case extinguishes the *personal liability*. It does not in case of duties; because, no matter what may be the fate of the goods held for the duties, the personal liability continues.

A mortgagor may insure the vessel mortgaged, without specifying his interest as incumbered, and recover as owner. 2 Caines's Rep. 19; Caines's Ca. Er. 124; 1 Johns. Rep. 385. Even a mortgage of land is not in effect regarded as giving an interest in the land, even at law; but is looked on as a mere chattel interest. 11 Johns. Rep. 534; 15 Johns. Rep. 319. The utmost, in respect of the duty claim, to be pretended by the United States, is an interest in the proceeds of the goods liable to duty; but such an interest is not an interest in the property. In case of an insurance, an averment of interest in the property would not be sustained by proof of right to the proceeds. 11 Johns. Rep. 302.

Under the poor laws in England, property, though mortgaged, will support a claim of settlement at its full value, as if not mortgaged. 6 Term Rep. 755; 1 W. Bl. 598. A mortgagor of a ship cannot commit barratry, because deemed the owner. Marsh. Ins. 528. A mortgage of a ship is regarded as only a right by means of the ship to enforce payment of the mortgage debt. The mortgagor is liable for the ship's repairs, as if no mortgage were made. 1 H. Blac. 117; Abbott, 117.

The question of duties was not involved in this case in the court below. The claim for the duties was not therefore to be recognized by the court. The pretensions of the United States in the case, were paramount to all ownership or claims of duties, as the government demanded the whole property, under the charge of *unlawful* importation. The obligation and the claim for duties are incidental only to *lawful* importation. It is therefore contradictory to the very nature of such a case as the present, to assume that the claim for amount of duties *can be judicially known or regarded* in it. But in the very question of duties the owner of the goods has an interest, and it may be a subject of judicial controversy; and what is the value of that interest but the amount of the duties? It is no answer to say that the property has been here condemned and sold; and that the claimant can be restored only to the amount of sales remaining after deducting for the duties. For the purposes of the appeal only, the *judgment* complained of, and not the acts done in *pursuance* of the erroneous judgment, is to be regarded. The appellate court can take notice of the execution of the erroneous judgment only after reversing the judgment, and to determine the mode of doing justice to the appellant on the reversal. The *consequences* of the judgment constitute the ground of the complaint against it, and cannot come in to sustain it. As regards the present question, the sugars are to be treated as in their original specific condition. It is a cause of *complaint* that they were *not allowed to remain* so; but were converted into money, *by adverse proceedings*. Suppose the importer had wished to use the merchandize himself, would it not be deemed to be of the value to him of the cost and the amount of duties? Or, suppose that he intended to *export* the property and receive the drawback; where in such case is the proprietary interest to the amount of duties of government in the merchandize? Are not these to be considered by the court as rights, and rights of property in the importer, respected by our revenue system? But the theory of the district court in this case would contravene all this privilege, on every fair inference to be drawn from its existence. It may also be said too, that in reference to sales of merchandize even for home consumption, the amount of the duties is

part of its worth, *its value.* It has been decided that the importer is liable for duties, although another to whom he has sold the merchandize before entry has given bond and security for the duties. 1 Mason's Rep. 482. If the merchandize, while held at the custom house for duties, is destroyed, still the owner would be liable for the duties. Do not all these liabilities constitute an interest to the extent of the amount of duties involved in them? and, if so, that amount is part of the value of the property as concerns the owner of it.

On the merits it was contended, that in a proceeding of forfeiture like this, the rules of evidence applying to penal or criminal proceedings are to be observed; and that, accordingly, fraudulent intention must be proved. Unexplained discrepancy between the entry and the package may testify the sinister purpose; but still the court must be satisfied of that purpose having existed before it will condemn in a case of this description. 9 Wheat. 430. 3 Wheat. 232. 6 Wheat. 120. 2 Mason, 48. 12 Wheat. 480. 1 Paine, 129, 499.

Whether adjudged *brown* or *white*, there is no ground for forfeiture of the sugars, the testimony exhibiting justification for a belief that the sugars should, or might be, determined brown, and the court's opinion to the contrary only settling a doubt, and at most establishing an error of judgment and not a wilful deception: no *presumption* of fraudulent representation necessarily arises from showing a specification of an entry to be incorrect in regard to the commercial character or designation of an article, when that incident of the article is speculative, or may be variously interpreted; or when, at all events, as in this case, it is variously defined by the opinions and experience of commercial witnesses.

Mr Taney, attorney-general, contended that the opinion of the district judge of Louisiana in condemning the sugars, and refusing the appeal, was correct.

Mr Justice M'Lean delivered the opinion of the Court.

This case is brought before the court, by an application for a mandamus to be directed to the judge of the court of the United States for the district of Louisiana, requiring him to allow an appeal from the judgment of that court.

In their petition the claimants state, that the eighty-four boxes of sugar were consigned to them at New Orleans, and that on their arrival, they were libelled by the United States for an alleged breach of the revenue laws; that the sugars were valued by the two custom house appraisers at two thousand six hundred and two dollars fifty-one cents; that they were afterwards condemned and sold by the marshal at public sale, for two thousand three hundred and thirty-eight dollars forty-eight cents, leaving two thousand one hundred and fifty dollars six cents, after deducting the costs and charges of the sale.

From the judgment of condemnation the claimants prayed an appeal to the supreme court; which was refused, on the ground that the value of the sugars, exclusive of duties, is less than two thousand dollars.

By consent of parties, if the claimants shall, in the judgment of this court, be entitled to an appeal, the merits of the case shall be considered as regularly before the court, for a final decision.

Whether the claimants were entitled to an appeal, is the first point to be considered.

The decision of this question depends on the amount in controversy. If it be less than two thousand dollars, the judgment of the district court was final, and cannot be revised by an appeal.

The judgment of condemnation was entered on the 9th of April 1831, and on the 28th of the same month, under the order of the court, the marshal sold the property.

On the 19th of April an appeal was prayed, and an order was made, that the district attorney should show cause on the 23d of the same month, why an appeal should not be granted.

In his opinion against the right of the claimants to an appeal, the district judge says, that "the supreme court has lately, in the case of Gordon v. Ogden, decided, that the defendant cannot support an appeal, from a judgment obtained against him in the court below for a less sum than two thousand dollars, because that judgment is the only matter in dispute." "In this case," the judge says, "the thing demanded on one side was the forfeiture of a specific quantity of sugar, and

on the other the restoration of the same article, the value of which did not amount to two thousand dollars." "There was no demand of duties, nor could such demand have been taken into consideration in the case then before the court. There was no contest about the duties."

It will be observed that at the time the judgment of condemnation was entered, and also when the appeal was prayed, the sugars remained in the hands of the proper officer. Suppose the judgment had been given for the restoration of the property, in what form should it have been entered? Could any part of the property have been detained for the payment of the duties? The duties were not then due, and could the court have directed them to be paid, by the sale of a part of the property?

A judgment in favour of the complainants in the district court should have directed the property to be restored to them, on the payment of the duties or securing them to be paid, according to law. This would have given to the claimants the whole amount of their property, as though no seizure of it had been made. Under the law, they were entitled to a credit for the payment of the duties, on the condition of giving bond and security.

Does it not thus appear, that the whole of the property was the amount in dispute, and would have gone into the possession of the claimants had the judgment of the court been in their favour? How then could it be said in the court below, that the duties must be deducted from the value of the sugars, as forming no part of the controversy; and that by such deduction the value of the property was reduced below the amount which entitles the claimants to an appeal?

If the claimants had given bond for the payment of the duties, and a judgment of restoration had been entered by the court, before any part of the duties became payable, should the court have directed them to be paid? Such an order, under such circumstances, would be oppressive and unjust.

The duties having been secured to the government, as the law requires, no wrongful act on the part of the officers of the government, could lessen the term of credit fixed by the law and stated in the bond. And if no bond had been given, be-

cause of the seizure of the property or its restoration, the claimants would have been at least entitled to a credit for the unexpired time allowed by law for the payment of the duties, on their giving the requisite bond and security.

The case must stand before this court on the appeal, as it stood before the district court, at the time the appeal was prayed. No subsequent action of the court in the sale of the property can affect the question. Before this court, therefore, the case must stand, on the judgment of condemnation; and this, before the duties were payable by law. Was not the entire property, and consequently, its full value, in dispute between the parties at the time judgment was entered?

On the one side a condemnation of the property is claimed, on the ground that the revenue law has been violated; and on the other a restoration of the property is demanded. In this view, this court think the right of appeal from the judgment of the district court, was clear, as the value of the property in controversy exceeded two thousand dollars.

The next inquiry is, whether the sugars were entered for the payment of duties, under a false denomination, with a view to defraud the revenue.

The sugars were entered as *brown*, on which a duty of three cents per pound is paid; and the libellants contend, that they should have been entered as white, on which a duty of four cents per pound is paid. The quality of the sugars can only be ascertained by a reference to the proof in the case.

The witnesses differ in their opinion as to the quality of these sugars. Bertrand and Smelser, two of the custom house officers, say the sugars were white; and their testimony is corroborated by five other witnesses. But a still greater number of witnesses, embracing the largest importers of sugars at New Orleans, are of the opinion that the sugars were properly denominated brown, by the importers. Some of the boxes appeared to be whiter than others, but by far the greater number, as it would seem from a majority of the witnesses, were brown.

J. W. Zacharie says that he is engaged in the importation of Havana sugars, and that had he been ordered to purchase white sugar, he would not have purchased the sugars in question. That if he had entered these sugars as brown, for the

payment of duties, he would not have considered himself as practising a fraud on the government.

A. Fiske states, that he knew sugar of superior quality imported as brown sugar, and that it is very difficult beforehand for an importer to know how his sugar will be classed. He says, when the qualities of superior brown and inferior n approximate, a very fair difference of opinion may exi as to the quality.

Mr Grant states, that he has had great experience in white Havana sugar. and after examining the samples of the sugars shown him, says that a majority of them a brown, though there may be a few boxes of white. He would not purchase them as white, on an order for sugar of that quality.

A. R. Taylor and Joseph Cockayne state, substantially, the same facts as Mr Grant.

Mr Suarez says that a portion of the sugar shown him has been white, but being very old, it has become worse than brown, and that he would not purchase it as white sugar. He considers the entire lot brown.

J. H. Shepherd states substantially the same facts. It appears that the planters in Havana mark their white sugars with the letter B, and that the mark for brown is Q; and it appears from the testimony of Bertrand, one of the custom house officers, that he suspected a fraud was designed by the importers, as he discovered the marks on the boxes had been changed from B to Q. Two of the boxes had the letter B still on them.

Whether these changes were made by the planter or the importer does not appear; but Fiske and other witnesses state that the marks which are placed on sugars in Havana, depend very much on the fancy of the planters, and that they are sometimes marked B, with the view of selling them higher.

There does not appear to be any thing in these marks which shows that a fraud was contemplated by the importers. Any such inference is rebutted by many respectable witnesses in the case, who state that the sugars are of the quality denominated in the entry.

The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with

the rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred.

Under all the circumstances of this case, the court think, that the evidence not only fails to convict the claimants of fraud, in the entry of these sugars by a false denomination, but they think that the weight of testimony is in favour of the quality of the sugars, as stated in the entry. They therefore reverse the decree of the district court, and direct said court to enter a decree, that the proceeds of these sugars be restored to the complainants, if the duties shall have been paid; and if they shall not have been paid, as they are now due, that the restoration be of the balance of the proceeds, after deducting the duties.

The court think there was probable cause of seizure, and they direct the fact to be certified.

On consideration of the motion of the claimants, and of the arguments of counsel, as well for the United States as for the claimants, thereupon had, it is now here considered, ordered, adjudged and decreed by this court, that a writ of mandamus, as prayed for, be, and the same is hereby awarded, directed to the judge of the district court of the United States for the eastern district of Louisiana, ordering him to grant an appeal in the premises.

William Tyrell's Heirs, plaintiffs in error v. Andrew Rountree and others.

Ejectment. On the 12th of February 1807, an attachment was regularly issued by the court of Williamson county, Tennessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit. Judgment by default was entered on the 15th of October 1807; the property was on motion condemned, and a writ of venditioni exponas issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it, on the 2d of January 1808. The county of Williamson was divided on the 16th of November 1807, and that part of the land for which this ejectment was brought, lay in the new county called Maury. Held, that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property, which was already in his possession, by virtue of the attachment, and was already condemned by the competent tribunal. The subsequent division of the county could not divest his vested interest, or deprive the officer of the power to finish a process which was already begun.

ERROR to the circuit court of the United States for the district of West Tennessee.

An ejectment was brought by the plaintiffs in error to September term 1830, in the circuit court of West Tennessee, for the recovery of a tract of land, which, in the life time of the ancestor of the plaintiffs, had been taken in execution, and sold by the sheriff, to satisfy a debt for which judgment had been obtained in Williamson county, in the state of Tennessee. The suit was commenced by attachment, and the land for which this ejectment was instituted, was attached on the 13th of February 1807, the sheriff having made the following return to the writ of attachment. "Came to hand the 13th of February 1807, about nine o'clock, and levied immediately on an undivided half of three thousand eight hundred and forty acres of land, on both sides of Sugar Creek;" &c., being William Tyrell's right and interest therein.

On the 15th of October 1807, the plaintiff obtained judgment for his debt, and, on motion, the property attached was condemned, and a writ of venditioni exponas was ordered on

the same day. The writ was issued on the 24th of October 1807, and the property was sold on the 2d of January 1808. The defendants in error derived their title under this sale. On the trial of the ejectment in the circuit court, evidence was given which proved, that, at the time the attachment was laid on the land, it was situated in Williamson county; and that on the 16th of November 1807, the legislature of Tennessee passed an act dividing the county of Williamson, and erecting part of the same into a separate county, denominated Maury county; and that a portion of the land in controversy was situated in Maury county, when the same was sold by the sheriff of the county of Williamson.

The counsel for the plaintiffs requested the court to charge, that, whether the said judgment of the court of pleas and quarter sessions of Williamson county was void or not, the sale under it was void as to that part of the land which was situated in the county of Maury at the time of the sale; and that the sale and conveyance of the sheriff of the county of Williamson did not transfer that portion of the land.

The charge of the court was, that neither the judgment nor the proceedings in Williamson county were void, for any thing appearing or not appearing on the face of said judgment and the record thereof.

The court also charged the jury, that, if a portion of the land in controversy was situated in the county of Maury at the time of the sale thereof by the sheriff of Williamson, under the judgment of Molloy's executors, yet that such sale was good, and vested the title in the purchasers, as the land was all situated in Williamson at the time of the levy, where public notice of the sale was given, until within a few days of the sale, and that the sale was good by relation to the levy.

The counsel for the plaintiffs excepted to the charges of the court thus given, and a bill of exceptions was sealed by the court. Judgment having been rendered for the defendants, the plaintiffs prosecuted this writ of error.

The case was argued by Mr Coxe, for the plaintiffs in error; and by Mr Bell, for the defendants.

Mr Coxe, for the plaintiffs, contended, that after the division of the county, by the act of the legislature of Tennessee, in which act there was no saving clause as to the matter before the court, all the right of the sheriff of Williamson county to sell that part of the land which fell within the county of Maury, terminated.

The sheriff does not take possession of the land against which the process of execution issues, and under a writ of venditioni exponas he sells no more than the right and interest of the defendant in the same. He cannot deliver possession of the property he sells to the purchaser.

This shows that the sheriff has but a naked power to sell the lien of the plaintiff, which he has acquired by his judgment; and that it is co-extensive, and no more, with the limits of the county in which he can exercise the authority of a sheriff. As soon as any part of the property of the defendant is by law separated from the county of which he is the sheriff, all his authority to dispose of the rights over it acquired by the plaintiff in the judgment, are at an end.

By the laws of Tennessee of 1794, a judgment is a lien on all the lands of the defendant in the state, and execution may issue from the court in which the judgment is obtained, to the sheriff of the particular county in which the land of the defendant may be situated. As therefore the lien of the plaintiff in the suit under which the land in controversy in this case was sold was not affected by the division of the county, the plaintiff might have had process of execution to the sheriff of Maury county, and have thus sold the land of the defendant. Instead of this, he employed the original execution. Cited, Bacon's Abr. Execution.

Mr Bell, for the defendants in error, argued, that by the attachment the sheriff of Williamson county became fully invested with such a possession and control over the land attached as authorised him when judgment should be obtained, and process of execution issued, to dispose of it. The attachment issued on the 13th of February 1807, and before the act dividing the county was passed, every thing to complete and

secure the rights of the plaintiff over the land attached, and to empower the sheriff to dispose of it, was done.

As the sheriff does not deliver possession of the land he sells under an execution, his powers under the process were not affected by the act dividing the county. After the sale, the rights of the purchaser could be enforced in an ejectment, and did not require any further act of the sheriff to complete them. The sheriff is not by the law of Tennessee required to go to the land he takes in execution; and he sells it at such place as he may think proper.

The rights of the plaintiff under the attachment, the judgment and the execution, were fully vested and secured before the act for the division of the county was passed; and those rights could not be affected by the same. He could not be interrupted or delayed in the use and enjoyment of those rights; nor could they be postponed. To decide that he must have resorted to new proceedings, would be to say that he could be deprived of the rights thus obtained, by a law passed after they had been acquired and completed. Such a law would impair rights protected by the constitution of the United States, and that of the state of Tennessee.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

In this case the plaintiffs in error contend that the circuit court misdirected the jury; in consequence of which, the verdict ought to be set aside, the judgment reversed, and a venire facias de novo awarded.

They had brought an ejectment for a tract of land, the title to which was shown to have been in their ancestor; but which the defendants claimed under a conveyance thereof made by the sheriff of Williamson county, in West Tennessee, in pursuance of a sale made by him under a writ of venditioni exponas, issued on a judgment rendered in a suit commenced by attachment.

On the 12th day of February 1807, the attachment was regularly issued, and was levied on the 13th of the same month on the land in controversy. The defendants in the attachment did not appear, or replevy the property, but made

default; on which judgment was rendered on the 18th of October 1807. On motion, the property attached was condemned, and a writ of venditioni exponas awarded, which issued on the 24th, and came to the hands of the officer on the 28th of October 1807, who sold on the 2d of January 1808.

The plaintiffs proved that the county of Williamson was divided on the 16th of November 1807, and that part of the land for which the ejectment was brought lay in the new county called Maury. He therefore moved the court to instruct the jury that the sale was void as to that part of the land which was situated in the county of Maury, at the time of the sale; and that the conveyance of the sheriff did not transfer that portion of it.

The court instructed the jury that the sale was good by relation to the levy. To this instruction a bill of exceptions was taken, and the cause is brought up by writ of error.

The counsel for the plaintiffs in error has argued the cause as if the process under which the sale was made had been the usual execution awarded on a judgment rendered against a person brought into court by regular process. Without inquiring whether his objections to the charge would have been well founded, had that been the character of the case, it is sufficient to observe that, in the actual cause, the land itself was attached. Not having been released, it remained in the custody of the officer subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment and was already condemned by the judgment of the competent tribunal. The subsequent division of the county could not divest this vested interest, or deprive the officer of the power to finish a process which was rightly begun.

There is no error in the charge, and the judgment is affirmed with costs.

The Lessee of Edward Livingston and others v. John Moore and others.

The titles to lands under the acts of the legislature of the state of Pennsylvania, providing for the sale of the landed estate of John Nicholson, in satisfaction of the liens the state held on those lands, and the proceedings under the same, are valid.

These acts, and the proceedings under them, do not contravene the provisions of the constitution of the United States, in any manner whatsoever.

The words used in the constitution of Pennsylvania in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of John Nicholson.

IN error to the circuit court of the United States for the eastern district of Pennsylvania.

In the circuit court, the plaintiffs in error instituted an ejectment for a tract of land in the county of Franklin, in the state of Pennsylvania. They showed title to the land as the heirs of John Nicholson, who was seised of the same at the time of his death, under a warrant, survey and return of survey, and payment of the purchase money to the state.

The title of the defendants was regularly derived from a sale of the lands of John Nicholson, made under the authority of the state of Pennsylvania, towards satisfying the lien claimed by the state for the debts due by John Nicholson, arising from his defalcation as the comptroller-general of the state.

The constitutionality and validity of that lien were denied by the plaintiffs.

On the 13th of April 1782, John Nicholson was, by an act of the legislature of Pennsylvania, appointed comptroller-general of the state, and was entrusted with large powers for the collection of the debts due to the state, the settlement of public accounts, and the management of the funds of the state.

Mr Nicholson acted as comptroller for twelve years, during which time he was impeached, tried and and acquitted. He afterwards, on the 11th of April 1794, resigned the office.

By accounts stated, on the 19th of November 1796, large

balances were found to be due by Mr Nicholson to the state of Pennsylvania. On an account, No. 1, headed "Dr, John Nicholson, account in continental certificates with the state of Pennsylvania, Cr," the balance was fifty-one thousand two hundred and nine dollars and twenty-two cents; and on another account, No. 2, headed "Dr, John Nicholson, account, three per cent stock in account with the state of Pennsylvania, Cr," the balance was stated to be sixty-three thousand seven hundred and thirty-one dollars and six cents.

The original accounts were given in evidence on the trial in the circuit court, and also counterparts of them signed by the respective officers, upon which were indorsements, one in the handwriting of Mr Nicholson, the other in that of his counsel in a suit instituted against him for the recovery of the debts due to the state.

A suit was commenced in the supreme court of Pennsylvania, by the state against John Nicholson to September term 1793, for the loss sustained by the state on certain certificates, which it was alleged he had improperly subscribed; and a verdict was obtained against him on the 18th of December 1795, for four thousand two hundred and eight pounds eight shillings and ten pence. No execution was ever issued on this judgment.

To September term 1795 another suit was instituted by the state of Pennsylvania against John Nicholson, being an action of trover for certain continental certificates and funded stock of the United States. Judgment was entered in this suit on the 20th of March 1797, on the following agreement, signed by the attorney-general of the state, and by the counsel for the defendant.

"21st of March 1797, by agreement filed, the judgment is for the sum of one hundred and ten thousand three hundred and ninety dollars and eighty-nine cents, rating the stock as follows: six per cent at sixteen shillings and ninepence in the pound; three per cent at ten shillings; militia certificates at fifty per cent; and that, in the set off, the stock be allowed at the same rate; the defendant to be allowed three months to point out any errors to the satisfaction of the comptroller and register general, such errors to be deducted from the sum for which

judgment shall be entered. Certificates and receipts to be credited also, with the charges of the funded debt. Errors against the commonwealth, if any, also to be corrected. The sum for which judgment is now entered, to be altered by the subsequent calculation of the comptroller-general alone. Supreme court, costs taxed at thirty-five dollars and thirty-five cents."

Executions were issued on the judgment in the year 1798, and afterwards in 1803, to many counties in the state, and proceedings to condemn the lands of the defendant took place. Between the 8th of March 1796, when the first settlement of the accounts of John Nicholson was made, and the 21st of March 1797, when the state judgment was entered, many judgments were obtained by the private creditors of Mr Nicholson, which remain unsatisfied on the records. On some of these judgments executions were issued and levies made on the real estate of the defendant prior to the executions levied by the state on the same lands. Mr Nicholson was arrested under executions by private creditors, and died in prison in December 1800. His heirs were then minors, and they all left the state prior to 1804.

The legislature of Pennsylvania passed at different periods, laws for the settlement of accounts and the collection of debts due to the state.

By an act passed on the 18th of February 1785, it was provided, "that the settlement of any public account by the comptroller, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all the real estate of such person throughout this state, in the same manner as if judgment had been given in favour of the commonwealth, against such person for such debt in the supreme court; and if, after an appeal from the said settlement of accounts by, or award of, the said comptroller-general, and confirmation thereof by the supreme executive council, the said settlement shall be confirmed, the said supreme court shall award interest thereon, from the date of the confirmation of the said settlement of account by the supreme executive council, and costs, to be paid by the appel-

lees." By the sixth section of this act, if the governor is dissatisfied with a settlement, or of opinion that a legal discussion will tend to the furtherance of justice, he may direct a suit, which shall be proceeded in as in other civil actions. By an act passed 1st of April 1790, the office of register-general having been created, all accounts are first to be settled by him and afterwards examined by the comptroller-general, and then transmitted to the executive council for its approbation. And by the fifth section, all settlements, under this act, shall have the same force and effect, and be subject to the same appeal as those made formerly by the comptroller-general. After the passage of these acts, the constitution of the state was changed, and the executive power was vested in a governor instead of the executive council. On the 14th of January 1791, an act was passed by which all duties directed to be done by the president and executive council, shall be done by the governor. This act was limited to the end of the session.

On the 13th April 1791, the act of 1st April 1790 was continued to the end of the then session; but with a proviso that in all cases when accounts examined and settled by the comptroller and register, or either of them, have heretofore been referred to the executive authority, to be by it approved and allowed, or rejected, the same shall only in future be referred to the governor, when the comptroller and register shall differ in opinion; but in all cases where they agree, only the balances due on each account shall be certified by the said comptroller and register to the governor, who shall thereupon proceed in like manner as if the said accounts had been referred to him according to the former laws on the subject; and provided always, that in all cases when the party or parties shall not be satisfied with the settlement of the accounts by the comptroller and register, or when there shall be reason to suppose that justice has not been done to the commonwealth, the governor may, and shall, in like manner, and upon the same conditions as heretofore, allow appeals, or cause suits to be instituted, as the case may require. By the act of 28 March 1792, this law was continued until the end of the next session.

By two other acts, it is continued to the end of the session of 1793, 1794.

An act was passed 22d April 1794, reciting, that under the old constitution, acts were passed vesting powers in the executive council or president, and that it was expedient such powers should be vested in the governor, which enacts, "that in all cases where, by the laws of the commonwealth, the supreme executive council, or the president, or vice-president thereof, is mentioned as having power and authority to carry the same into effect, the governor for the time being shall be deemed and taken to be in the place and stead of the same supreme executive council, or the president or the vice-president thereof, and shall have and exercise all the powers in them, or any or either of them vested, unless such powers have been, and are by law vested in some other officer or officers, person or persons, or shall be inconsistent with the provisions contained in the existing constitution of the commonwealth."

By this act all accounts are in the first instance to be submitted to the register, who shall adjust and send them to the comptroller, who, if he approve the settlement, shall return the same to the register. But if he disapprove, and they cannot agree, shall transmit the same to the governor, who shall decide. Provided, that in all cases where the parties shall be dissatisfied with the settlement of their accounts, an appeal shall be allowed.

On the 31st of March 1806, an act was passed by the legislature of Pennsylvania, entitled "an act for the more speedy and effectual collection of certain debts due to this commonwealth." The following is a summary of the first ten sections of that act.

Sect. 1. Commissioners appointed with powers to procure copies of deeds and other writings, relating to the real estate of John Nicholson. 2. The commissioners to receive on application, copies of all necessary papers, from the land officers, without fees. 3. To ascertain, as near as may be, the quality and extent of the estate of John Nicholson in each county, subject to the lien of the commonwealth. 4. To average the demand of the commonwealth on the several estates subject to the lien, and make report to the governor, who shall cause the same to be sold, &c. on the payment of the sum assessed on any particular estate by any person claiming an interest therein, the commissioners empowered to convey to such persons the estate or lien thereon. 5. Where the commissioners shall

be authorized to compromise with individuals or the managers of land companies. 6. In what cases the commissioners may purchase in the property for the use of the state. 4th, 5th and 6th sections, repealed and supplied. 7. Commissioners to take oath or affirmation for the faithful discharge of their duties. 8. Their compensation. 9. Empowered to recover by due course of law, books and papers, &c. 10. Commissioners of the several counties prohibited from selling any of the lands of John Nicholson for taxes.

Sect. 11. And be it further enacted by the authority aforesaid, that in any case where the said John Nicholson, in his life time, had or held lands in partnership, or in common with any other person or persons, the said commissioners, or a majority of them, are hereby authorized to cause partition to be made of the said land by writ or otherwise, in order to ascertain the respective interests of the said part owners, as well as the separate interest of the said John Nicholson, and if it shall be necessary to make said partition by writ, in case of disagreement between the parties, the said commissioners or a majority of them, shall be made parties to such writ, either plaintiffs or defendants, and such partition, so made, shall be as available in law, as if the same had been made by the said John Nicholson in his life time, and the costs thereof shall be paid equally by the parties as in other cases, and the said commissioners shall be allowed for their part of such costs in the settlement of their accounts.

Further legislating on this subject, on the 19th of March 1807, an act was passed, entitled "a supplement to an act, entitled 'an act for the more speedy and effectual collection of certain debts due to this commonwealth.'"

Sect. 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that the commissioners appointed under the act to which this is a supplement, shall make report of their proceedings to the governor, who, on approbation thereof, shall issue one or more process to the said commissioners, commanding them, or a majority of them, to sell such lands or interest in lands, as the said commissioners may specify in their report as the property of the late J. Nicholson, and in all cases of sales to be

made by the commissioners or a majority of them, at least twenty days notice shall be given of the time and place of sale by advertisement in the newspaper printed in the county where the lands respectively lie, if any be there printed, and if not, in the newspaper printed nearest to such county, and also in two papers printed in the city of Philadelphia. Provided, that nothing contained in this section shall operate to abridge the powers of compromise vested in the said commissioners by the fourth section of this act.

Sect. 2. In all cases of sales under this act, the purchaser or purchasers shall pay the amount of the purchase money into the state treasury, and the payment of no part of the purchase money shall be deferred for a longer time than four years, and whenever any part shall be deferred for any length of time within that period which is hereby referred to the discretion of the commissioners, or a majority of them, immediately superintending any sale, such deferred payments shall carry interest from the time of the sale, and shall be secured by bonds given by the purchaser or purchasers with surety, approved by the commissioners or a majority of them as aforesaid, payable to the treasurer of the commonwealth and delivered to the said commissioners or a majority of them at the time of sale, and the said commissioners or a majority of them shall, on the receipt of the bonds aforesaid, deliver to every purchaser a certificate of the property sold to him, the time and place of sale and the bonds received, and shall also deliver into the hands of the treasurer within two months from the time of sale, all bonds received for or on account of such sales, and within the same time make a particular return into the office of the secretary of the commonwealth to the process of the governor of the quantity of land sold, the situation thereof, the price at which it was sold, and how paid or secured, which said process and return shall be carefully registered and filed by the said secretary, who is hereby required upon the application of any purchaser or purchasers, or any person on his or their behalf, on production of the certificate aforesaid and the treasurer's receipt for the consideration of the purchase, to make and execute a deed or deeds to the purchaser or purchasers for the property sold to him or them, as and for such estate as the said John Nicholson had or held the same at the

time of the commencement of the liens of the commonwealth against the estate of the said John Nicholson, which said conveyances or copies of the records thereof shall be prima facie evidence of the grantee's title: provided, that the respective bodies or tracts of land sold under this act shall be subject to the payment of the purchase money thereof.

Sect. 3. The said commissioners or a majority of them are hereby authorized and empowered to expose any body of lands late the property of the said John Nicholson late deceased, which are subject to the lien of the commonwealth, to sale under and by virtue of the process to be issued by the governor as aforesaid, either in gross or by separate tracts as to them or a majority of them may appear most advisable.

Sect. 4. The said commissioners or a majority of them shall have full power to settle by compromise or otherwise with any person or persons who in any manner may allege title to any of the lands late the property of the aforesaid John Nicholson, deceased, on such terms as to them may appear most eligible, and their proceedings therein shall be final and conclusive on the commonwealth: and upon any compromise made with any person or persons, the said commissioners or a majority of them, at the request of the party and upon his or their paying the consideration money into the state treasury, or securing the payment of the same, may and shall execute and deliver an asssignment under their hands and seals of so much of the liens of this commonwealth against the estate of the late John Nicholson, as may be equivalent to the consideration paid or secured to be paid as aforesaid by such party, and from the date of such assignment the whole amount thereof shall be principal bearing legal interest, and the holder or holders of such assignments, or his or their assigns may at any time proceed upon the liens of this commonwealth to sell the lands which may constitute the subject of such compromise.

Sect. 5. If the commissioners or a majority of them should be of opinion that it would be more to the advantage of the commonwealth to purchase any of the property to be offered to sale under this act for the use of the commonwealth than to suffer the same to be sold for a sum less than the estimated value thereof, they, or a majority of them are hereby empowered so to do, and in this, as in cases of sales to individuals, the

commissioners are enjoined to make a special return into the office of the secretary, who shall as in other cases, register the return, which shall vest in the commonwealth all the title to the property so purchased, which the said John Nicholson had therein at the date of the commonwealth's liens, and the lands so purchased shall be disposed of in such manner as shall hereafter be directed by law: provided, that no purchase, either directly or indirectly, shall be made in behalf of the commissioners aforesaid in their own right, nor shall any of the property of John Nicholson be vested in them otherwise than as in trust for the commonwealth.

The succeeding sections have no application to the questions in this case.

The court charged the jury,

1. That the accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted, that the balances or sums of money, thereby found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson, throughout the state of Pennsylvania.

2. That the judgments rendered by the supreme court of the state, in favour of the commonwealth, against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

3. That the several acts of the general assembly of Pennsylvania, passed on the 31st of March 1806, and on the 19th of March 1807, are not repugnant to, or in violation of the constitution of the United States, or of Pennsylvania; but that they are good and valid laws, and a rightful exercise of the powers of the legislature of Pennsylvania; that the whole law of the case is therefore in favour of the defendants.

The defendants were purchasers of the land for which this suit was instituted under the provisions of these laws.

The case was tried in October 1828, and a verdict and judgment, under the charge of the court, were rendered for the defendants(*a*). The plaintiffs excepted to the charge of the court,

(*a*) The very learned and highly interesting charge, delivered to the jury by the honourable Judge Hopkinson, on the trial of this case in the circuit court of Pennsylvania, will be found in an Appendix to this volume.

on the points stated at large in the arguments, and in the opinion of the court.

Exceptions were also taken during the trial to the ruling of the court in matters of evidence, which also sufficiently appear in the arguments of counsel, and the opinion of this court.

The case was argued by Mr C. J. Ingersoll, with whom also was Mr Taney, for the plaintiffs; and by Mr Binney, and Mr Sergeant, for the defendants.

Mr C. J. Ingersoll, for the plaintiffs.

By the agreement under which this case was tried, both plaintiffs and defendants claim under Nicholson, whose title is admitted, unless divested by the alleged lien and proceedings of the state which create the defendants' title.

For the plaintiffs, it will be submitted, first, that the acts of assembly in question are unconstitutional; secondly, that the state had no lien; and thirdly, that the court erred in ruling certain points of evidence.

1st. The question of constitutionality. By their act of the 13th of April 1782, the legislature of Pennsylvania conferred on Nicholson extraordinary powers and duties, judicial and executive as well as fiscal, by appointing him comptroller-general. 2 Dallas's edition of the Laws of Pennsylvania, 44; 2 Smith, 19. After twelve years service in that office, he was accused of misdemeanour, impeached, tried and acquitted; but resigned the 11th of April 1794. Much precipitate and passionate legislation ensued, with a view of recovering certain debts which he was charged with owing the commonwealth; continued by various provisions through a period of fourteen years. The final acts of 1806 and 1807 ordered confiscation of his large real estates, comprehending several millions of acres throughout the state, worth more than twenty times enough to pay all its alleged demands, and all his private creditors: but unconstitutionally sacrificed by commissioners appointed by these acts, at their arbitrary sales, contrary to the due course of law, and uncontrolled by any court of justice, by proceedings altogether extrajudicial: these large estates produced probably little more than paid the commissioners' charges. The same acts

also order Nicholson's papers to be seized wherever met with, and secured in public office: private and official, they have all been in the state's exclusive keeping ever since. Thus stripped, spoiled by the state of all his possessions and titles, character and credit, and imprisoned by private creditors, but resolved not to surrender estates, which he knew were much more than sufficient to satisfy his debts, always denying that he was in debt to the state at all, Nicholson languished till he died in jail, the 2d of December 1800. His widow and minor children went into exile from Pennsylvania: nor was it till lately that they had the means or the courage to seek judicial redress.

As soon as Nicholson was out of office, an act of assembly of 20th April 1794, (3 Dallas's edition of the Laws of Pennsylvania, 790,) made provision for the settlement of his accounts: but neither this act, nor that of 1792 appointing him to office, asserts any lien on his estate. This was done by the twelfth section of the act of 13th February 1785, 2 Dallas's edition of the Laws of Pennsylvania, 251, which declares that the settlement of any public account by the comptroller-general, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all the real estate of such person throughout this state; *in the same manner as if judgment had been given* in favour of the commonwealth, against such person for such debt, in *the supreme court.*

The state is supposed to set up three liens against Nicholson. 1. A fiscal lien by treasury settlement. 2. Judicial lien by judgment in the supreme court. 3. A posthumous lien by operation of law on Nicholson's death, insolvent, as is charged.

Whether, as the act of 1782, appointing Nicholson comptroller-general, creates no lien, that of 1785 could superadd such liability to the original contract between him and the state, will not be made a distinct point; but without waving after thus suggesting it, left for the determination of the court.

The act of the 31st of March 1806, (Bioren's edition of the Laws of Pennsylvania, vol. 8. p. 166,) though entitled an act

for the more speedy and certain collection of certain debts due to the commonwealth, is confined to the debts claimed of Nicholson alone. It assumes such debts without specifying sum, date, or any other particular. It also assumes what is called the lien, without specifying whether fiscal or judicial, or when it accrued. The lien thus assumed, for a debt thus unexplained, is extra-judicially put in force: for though by the fourth section the sheriffs are appointed to sell the lands, and directed to do so according to due course of law; yet their mandates issue from the governor instead of any court of justice, and the whole proceedings are subject to no judicial control whatever. The supplemental act of the 19th March 1807, (Bioren's edition of the Laws of Pennsylvania, vol. 8, p. 208) removes every vestige of judicial proceeding and control. The sheriff's agency is dispensed with. Nothing is said of due course of law; but the commissioners appointed by the act are arbitrarily to realize the avails of the lands, without the agency or control of any court or officer of justice.

Granting the state lien to be, what the act of 1785 declares, like a judgment, may it be thus enforced? The state contends that these acts of assembly do but accelerate and invigorate the remedy, by provision for putting the lien in force. The plaintiffs insist that they violate the right. It would be as lawful for the party state to enforce its lien by military power. The state's argument, if it prove any thing, proves too much; for it maintains that this lien might be enforced by any means whatever. The plaintiffs submit that, whatever the proceedings be, however the due course of law may be changed, it cannot be dispensed with. The proceeding must be judicial. Though the state has not specified what lien it relies upon, yet the ninth section of the act of 1807, by assuming the 20th December 1797 as the date, sufficiently proves that its reliance was on the fiscal lien by treasury settlement of that date. Granting either lien, fiscal or judicial, the plaintiffs insist that it can be only realized by judicial execution. The debtor party cannot be deprived of redress by due course of law, for any complaint he may make. Unquestionably he is so by these acts. Their provisions are superfluous. The same power that can enact, may dispense with them. They are the mere machinery of confiscation. If they are con-

stitutional acts, the same power might have dispensed with that machinery, and enacted by one simple provision, that the lands of Nicholson belong to the state. Nor was this machinery even designed for his benefit, but merely to sell the lands, profitably, for the advantage of the state. Due course of law, as that phrase has been understood ever since Magna Charta, means the ancient and established course of law, the established course of judicial proceedings. 2 Inst. 60, 61; 1 Black. Com. 138, 139. It may be said that Coke, in the passage referred to, means criminal law; but this court put no such limitation on the phrase, but understand it to mean all judicial proceedings whatever, in the case of the Bank of Columbia v. Okely, 4 Wheat. 244.

There were three contracts between the state and Nicholson: 1. That, by the acts of 1782 and 1785, appointing him comptroller-general, and fixing his liability in case of indebtedness, which was to be a lien like a judgment in the supreme court; 2. That, by the warrant for the land, which was a grant that estops the state from resuming it; 3. By the agreement for judgment entered in open court. By each and all of these contracts, the state bound itself to abide by a lien after the manner of a judgment; that is, an incumbrance to be judicially realized according to the common process used in due course of law, issuing from a court of justice always open to the complaints of all parties. This is the vital principle of all the three contracts: to be under the jurisdiction of a court of law, empowered to redress any complaints.

The twelfth section of the act of 1785 is express, that the lien shall be in the same manner as a judgment in the supreme court: in other words, that it shall be like a judgment, which is an incumbrance by itself inoperative, until put in action by the execution which crowns it. Wayman v. Southard, 10 Wheat. 23. Execution is necessary for the perfection of judgment, and consequently, indispensable for the beneficial exercise of jurisdiction. It is putting the sentence of the law in force. 3 Black. Com. 412. In like manner, the agreement confessing judgment, ex vi termini, imports liability to judicial execution; not executive, arbitrary, or contrary to the usual course of judicial process. It may be said that the language of the act of 1785, giving a lien like a judgment in the supreme

court, means nothing more than an incumbrance co-extensive with every county in the state. But this interpretation was rejected in the circuit court, for the obvious reason that a prior paragraph of the same section of the act provides in terms for that purpose, which therefore would not be repeated. Both the fiscal and judicial liens are but executory, *jus ad rem*, not *in re*, requiring other process to execute them. There is a right to lien, but not to execution. The obnoxious acts give execution; not such as follows judgment in due course of law, but extraordinary, arbitrary, executive, extra-judicial, and therefore unconstitutional execution of the lien.

Such laws it is submitted,

1. Impair the obligation of contracts, contrary to section 10, article 1, of the constitution of the United States, and they impair contracts, contrary to section 17, article 9, of the constitution of Pennsylvania: for these acts, by contravening the latter constitution, avoid all the difficulties into which this court was thrown by the alleged distinction between a contract and the obligation of a contract. 12 Wheat. 239, 240, 241, 242, 256, 257, 258, 259.

2. They take property and apply it to public use without just compensation, contrary to section 10, article 9, of the constitution of Pennsylvania.

3. They deprive of remedy by due course of law for injury done, contrary to section 11, article 9, of the constitution of Pennsylvania.

4. They violate the right of security in person and papers from unreasonable searches and seizures; contrary to section 8, article 9, of the constitution of Pennsylvania; and the fourth amendment of the constitution of the United States.

5. They violate the right of trial by jury; contrary to section 6, article 9, of the constitution of Pennsylvania, and the seventh amendment of the constitution of the United States.

Lastly. They violate the fundamental principle of social and political compact, which withholds from a body politic, as from all its individual members, the power to judge in its own cause, and enact exceptive laws, in particular instances, in derogation of the common law.

Thus the obnoxious acts violate, 1st, universal law or common justice; 2nd, the constitutional or organic law of this fe-

deral union of the states; 3d, the constitutional or organic law of the state of Pennsylvania. In other words, they violate natural, federal, and municipal law.

The state rests on a lien in the same manner as if judgment were given in the supreme court. Manner comes from *manier*, to handle or execute. It is the way of executing. To be taken in the manner is to be caught in the execution of an offence. The circuit court considered this phrase a mere pleonasm. But that would violate the first rule of interpretation, which is to give to every word of a law, more especially to every substantive phrase, some meaning. The phrase in question obviously means a lien like a judgment. The mere word lien would do so by itself; that is to say a binding but inert incumbrance, to be realised by further and final process. According to the argument of the charge itself, the intention was to make the debt secure by the lien, the settlement being conclusive evidence of the debt, but to be recovered and collected in the ordinary way of a suit, judgment and execution. No attempt was made during ten years, from 1796 to 1806, to enforce the lien. But the judicial lien was proceeded upon in the manner of a judgment by judicial exemption. There were however numerous individual executions forestalling it. Whereupon, the acts of 1806 and 1807 undertook to realize the fiscal lien, because it preceded the individual executions.

That a state may be party to a contract with another state, or a corporation, or one or more individuals, and dealt with accordingly in courts of justice, is the established and familiar law of this country. Fletcher v. Peck, 6 Cra. 132, 2 Cond. Rep. 308; New Jersey v. Wilson, 7 Cra. 166, 2 Cond. Rep. 457; Green v. Biddle, 8 Wheat. 92; Providence Bank v. Billings, 4 Peters, 514; Sturges v. Crowninshield, 4 Wheat. 197, 4 Cond. Rep. 409.

It is also as well settled that a contract is a compact or agreement between two or more parties, whether communities or individuals, either executed or executory. Fletcher v. Peck, 6 Cranch, 136; Green v. Biddle, 8 Wheat. 92; Ogden v. Saunders, 12 Wheat. 297; Farmers and Mechanics Bank of Pennsylvania v. Smith, 6 Wheat. 132; Serg. Const. Law, 352; Crittenden v. Jones, and Glascock v. Steer, 5 Hall's Law Journ. 514; Vanhorn v. Dorance, 2 Dall. 304; Dash v. Van Kleeck,

7 Johns. 490; Pickett's Case, 5 Pickering, 65. To be sure it must be a contract concerning property, not a mere civil contract, such as that of marriage. Dartmouth College v. Woodward, 4 Wheat. 637, 644, 682. But even to forbear is as much a contract as to affirm; and it has been decided that acquiescence makes a contract. Western University of Pennsylvania v. Robinson, 12 Serg. and R. 29. Contracts are constructive as well as specific. Ogden v. Saunders, 12 Wheat. 317. Each party acquires a right in the other's promises, whether express or understood. Etymologically, contract means any agreement that draws two or more together. In common understanding it means any bargain. In law it means any agreement on good consideration to do or forbear any lawful act. Com. on Cont. vol. 1, p. 1; Powell on Cont. 234; 2 Black. Com. 442. According to the civil law it is an agreement which gives an action to compel performance. Wood's Institutes of Civil Law, 206; 1 Rutherforth, 204, ch. 13; Grot. b. 2, ch. 12; Paley, vol. 1, ch. 6, p. 145. Existing law, whether statute, common or customary, affecting a contract in its obligation, construction, or discharge, is always part of a contract, though not expressed to be so. Camfranque v. Bunel, 1 Wash. C. C. Reports, 341; Ogden v. Saunders, 12 Wheat. 291. All usages are no more than constructive contracts. The whole common law is little else; the land titles of Pennsylvania by warrant and survey also. Nicholson contracted with the state that his lands should be bound by a lien. The state contracted with him that the lien should be like a judgment. Such was the contract by the act of 1785, by the warrant of 1794, and by the judgment of 1797. All these were agreements for valuable consideration, concerning private property, like the contracts held sacred and not allowed to be impaired in the various cases before cited. If land is granted by a state, its legislative power is incompetent to annul the grant. United States v. Arredondo, 6 Peters, 738.

Such being the contract, and the law of contracts without provision in this instance for enforcing it, may that be done extra-judicially? Such enforcement could not have been in Nicholson's contemplation when he entered into the contract: nor will the law impute to him an anticipation of any unusual, much less extra-judicial execution.

There is a class of laws which are extraordinary, exceptive and prepotent from the necessity of things; such as laws of revenue, limitation, insolvency, usury, divorce, and the like. Perhaps all contracts for public office are of this class, as far as respects official salaries; though it is not altogether certain that by the act of 1785 the state could reduce the salary given to the comptroller-general by the act of 1782. This principle is questioned by Chief Justice Marshall in the Dartmouth College case, 4 Wheat. 694. For argument's sake we can afford to concede, without endangering Nicholson's case, that the state by subsequent acts might increase his duties, and reduce his salary. But the lien on his private estate could not be affected without his consent, nor otherwise enforced than as originally agreed.

It is very clear that the acts in question impair the contract, if there was one. To impair, etymologically from *impar*, is to render unequal, to make worse; and unquestionably these acts rendered Nicholson's estate worse. According to adjudications, whatever prejudices the validity, construction, duration, mode of discharge, or even evidence, of an agreement, in any manner or degree, impairs the contract, Ogden v. Saunders, 12 Wheat. 256, 257. Any law which lessens the original obligation impairs it, 12 Wheat. 337. The state will insist on state necessity and state power, its eminent domain. The question is whether any necessity will justify the exercise of extra-judicial power to enforce a contract which stipulated for the due course of law to enforce it. The acts in question, though rapacious, exceptive, arbitrary, unjust, impolitic and odious, may nevertheless be constitutional. But suppose a private creditor to have got such a law enacted for the collection of his lien debts, would not the enormity of that law flash conviction of its unconstitutionality? The state must show its superior power, on the tyrant's plea of state necessity, to enact such a law. Yet it is against this very power, dreadful in states, but never to be apprehended from individuals, that the constitutional provisions were intended to guard states that are not omnipotent even in the regulation of their revenue laws, but restrained by constitutional barrier. Laws of escheat, taxation, attachment, revenue, and the like, though summary, and contrary to the course of common law, for the more speedy and effectual recovery of certain claims, yet are always general in

their operation, uniform in their provisions, and subject to judicial control. It is not intended to deny the power of states to modify remedies. Sturges v. Crowninshield, 4 Wheat. 197, 200. The power to alter the modes of proceeding in suits at common law includes the execution of their judgments; Weyman v. Southard, 10 Wheat. 47; and a general superintendence over them is within the judicial province. But even an act of limitation barring passed decisions would be void. Society v. Wheeler, 1 Gall. 141. An act annulling a judgment would be void. Dash v. Van Kleeck, 7 Johns. 490. And in the same case it is said by Judge Thompson, that after the judgment of a court, legislation is incompetent to impose new rules of law. 7 Johns. 496. The distinction between remedy and right so equally divided the judges of this court in the case of Ogden v. Saunders, 12 Wheat. that it would be hazardous to attempt to define it. But even Messrs Clay, Livingston, and the other gentlemen who argued that case in contradiction to the argument now submitted, concede that all the sovereign power of states can be executed only by general, impartial and prospective legislation, not affecting vested rights or past transactions. The extinction of the despotic and iniquitous principle of retrospective legislation was the great object of the constitution; and the supposed distinction between right and remedy is often without foundation, as for instance, a law forbidding the institution of an action, though it seems to act on the remedy, annuls the right. The meaning of the term obligation is well explained by a recent French author of great authority—Toullier on the Civil Law, vol. 1, p. 84. If a state, undertaking to modify a particular law, in effect extinguishes the obligation, this would be an abuse of power; 12 Wheat. 352: nor does power to vary the remedy imply power to impair the obligation. Of this leading but contradictory case it may be said, 1. That all its argument and illustrations are distinguishable from Nicholson's case, because they look to laws that are general and not exceptive; 2. All the judges agree that ex post facto laws which abolish judicial action are unconstitutional; and 3. That even general laws, such as acts of limitation, are unconstitutional if they impair prior contracts. The cases of Fletcher v. Peck, the Dartmouth College, Sturges v. Crowninshield, and Ogden v.

Saunders, are, in principle, supporters of the argument now submitted.

Remedy, as defined by lexicographers, means literally, to cure. Blackstone speaks of the remedial part of a law. 1 Black. Com. 55. Right means just claim to any thing. Thus, in the language of the law, remedy is always used metaphorically. And the acts in question are not remedial; for they do not cure. They rather affect the right to judicial process, which they take away. Nicholson's contract provides that the process against him should be judicial, or rather that there should be no proceeding against him but by process. The act of 1785 gives lien, without providing how it should be enforced. Liens are always enforced by process. But the obnoxious acts, instead of supplying a defect of process, abrogate all process whatever, and substitute a commission which is equivalent to confiscation. They might as well have ordered the governor or the militia to seize the lands, or have opened a land office to sell them. Granting that the acts in question are even remedial, yet they are void because they abolish judicial remedy. Perhaps the legislature might erect new tribunals for the more speedy and effectual recovery of the debts said to be due by Nicholson. But they could not erect a tribunal to proceed extra-judicially. Should a state be so insane, says Chief Justice Marshall, 12 Wheat. 351, as to shut its courts, would this annihilation of remedy annihilate the obligation of the contract? Granted, that by general legislation the usual modes of process may be altered or abolished. But the power of a state to modify remedies does not authorize the substitution of extra-judicial proceedings instead of due course of law, even by general provision. Suppose the state has judgment against an individual, could an act of assembly authorize the courts of justice to dispense with all the established modes of proceeding, and to realize the debt by arbitrary execution? The proceedings in question are wholly unlike the established law of Pennsylvania. The act of 1700 (1 Smith's Ed. Laws of Penn. p. 7) carefully regulates the methods of execution; and the arbitration act of 1806, sec. 11 (4 Smith's Ed. of Laws of Penn. p. 329), carefully conforms to the provisions of the act of 1700. Courts martial, prevotal courts and all special commissions to try even criminals, at

least profess to proceed judicially, even though they differ from common law. It can hardly be said that the acts in question are revenue laws. But if even they were, the summary process authorized by acts of congress for the more speedy and effectual collection of the national income is uniformly and thoroughly judicial in its character. Act of 15th May 1820, 3 Story's Ed. Laws of the United States, sec. 4, p. 1791. Such was also the old revenue system; Act of the 14th July 1791, sec. 16, 1 Story's Ed. of Laws of the United States, p. 550. Such was the system of the late war taxation; Act of 1815, sec. 33, 2 Story's Ed. Laws of the United States, p. 1466. Such are all the tax laws of the state of Pennsylvania. It is believed that no instance can be cited of a stretch of legislative power by vigour beyond the law occurring in any of the United States such as the acts in question.

Nor are they countenanced by any adjudication. The case of Stoddard v. Smith, 5 Bin. 355, on which the circuit court relied, was that of a prior and a general act, not interfering with any judicial proceeding. Such also was the case of Emerick v. Harris, 1 Bin. 416, sustaining the arbitration law, on the ground that though it postpones it does not take away trial by jury. In the Bank of Columbia v. Okely, 4 Wheat. 235, a prior and a general law authorizing the bank to issue summary executions against its debtors was sanctioned by this court on the principle that such was part of the original contract. This case is fully explained by Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. 342. The Providence Bank v. Billings, 4 Peters, 514, determined that a state may tax a bank which it had chartered, because the state power of taxation is part of the original contract. Jackson v. Lamphire, 3 Peters, 280, decides that a general act authorizing commissioners to settle all disputes in one county is not unconstitutional. But in the opinion of the court pronounced in that case it is said that even recording and limitation acts, though within the discretion of a legislature, may be so unreasonably enacted as to require a judicial check. The difference is plain between this New York and this Rhode Island case, and the case in question: but the very circumstance of their being contested proves with what extreme jealousy all exceptive and ex post facto laws are viewed in courts of justice. There are several

cases in the Pennsylvania Reports which may be referred to as countenancing the acts against Nicholson: but upon examination every one of them will be found distinguishable. Underwood v. Lilly, 10 Serg. & Rawle, 97; Bambaugh v. Bambaugh, 11 Serg. & Rawle, 192; Barnet v. Barnet, 15 Serg. & Rawle, 72. By posterior act, the legislature might have raised an administrator to Nicholson's estate without requiring security, as usual; might have directed the sheriff to sell, dispensing with the ordinary methods and stages of execution; might have substituted the governor's warrant for the judicial writ of execution. But however the process might have been changed, it could not be annulled. The contract required judicial proceeding, and could be satisfied with none other. Whenever an individual enters into a contract, he assents to abide by the administration of justice common to the jurisprudence of his country, but to none other. 12 Wheat. 285.

It is thus supposed to be established: 1st. That there were the contracts of 1785, 1794 and 1797. 2d. That they were impaired. 3d. By extra-judicial enforcement.

In connexion with this position it will be convenient to consider the last; to wit, that the acts in question violate the fundamental principles of universal justice. The first and great adjudication on this subject, is Vanhorn v. Dorrance, 2 Dall. 304, which determines that a party state cannot by legislation alter its contracts; that it is not competent for the legislature of such state to judge of the necessity of altering such contracts; that no state can take away private property by special and individuated legislation; nor when private property is taken, by even general legislation, can the legislature settle the compensation to be allowed, which must be referred to the impartial umpirage of the judiciary. There is an implied contract between every state and every individual citizen of it, that all laws contrary to natural reason or justice, are void. The English cases on this subject are collected in 1 Kent's Com. 420.

In England, where there is no written constitution, acts of parliament contrary to natural equity, such as make one a judge in his own cause, are void. Day v. Savage, Hob. 87. Now there is no difference between the case of the individual and that of the state, except that as the state is much more formidable, a multo fortiori, should the judiciary prevent its

attempts to judge in its own cause. No government of laws is authorized to enact exceptional provisions, striking at one citizen-or one family, and depriving them of the benefit of the law common to all the rest. The sovereign people commit no such trust to a legislature. A legislature would be the most dangerous of all despotisms if it may single out an individual, as in this instance, post factum and post mortem, depriving his family of the law common to all the rest of the community, but closing the courts of justice against that family alone. The first principle of the social compact is, that no one of its members shall do himself justice, but seek it through the public authority with which its dispensation is deposited: hence the maxim, that every citizen is under the safeguard of the law; Toullier, vol. 1, p. 168; and is it not the worst conceivable violation of this principle, for the society in its dispute with an individual to undertake to regulate it itself, without suffering the interposition of the judiciary? The state, on this occasion, in fact, proceeded not in its sovereign capacity, but as a common creditor, and usurped all the powers, legislative, judiciary, and executive, which in every well regulated government are always kept distinct. It is high time to restore the true sense according to the plain language of the constitution, prohibiting all ex post facto legislation, instead of confining it to criminal cases, as has been generally done, owing to an early but total misapprehension of the law. The provision against ex post facto laws is twice repeated by the constitution of the United States; first, to prohibit congress, and, secondly, the several states, from the enactment of such laws. It is also in the constitution of Pennsylvania: the restriction on congress obviously embraces both criminal and civil cases; bill of attainder being used for the one, and ex post facto laws for the other. The clause restricting the states expressly comprehends *all* expost facto laws as well as *any* bill of attainder. And the context shows that this clause is dealing with unlimited prohibition. The states surrender the whole power without reserve. The constitution establishes the general principle of the inviolability of contracts. Ogden v. Saunders, 12 Wheat. 312. The universal law was so before the constitution, which is but declaratory of it. 12 Wheat. 303, 304; Federalist, No. 44. What right then has any judicial magistrate to put upon these provisions of the constitu-

tion a limitation not to be found in either the letter or the spirit? The mischievous influence of Blackstone's unsupported dictum, for which no authority can be vouched, but which is contrary to all English law, suggested the ill considered notion of judicial interpolation that has gained ground in this country. Legislation cannot be retroactive, for then it becomes adjudication. To regulate the past is judicial, to regulate the future is legislative. Toullier, vol. 1, sec. 1, p. 18. It is a first principle of the jurisprudence of all free people, having written constitutions, that legislation must be prospective and general, not retrospective or individuated. 1 Toullier, 96; Montesq. Esp. de Loix, liv. 11, ch. 6, liv. 6, ch. 5. A Turkish firman, or Russian ukase, by which a community or individual determines and executes his own cause, without judicial intervention, would be contrary to the general sense of mankind. The instances of laws which are void, as against common right, mentioned in the case of Calder v. Bull, 3 Dall. 388, are laws punishing innocent actions, violating existing laws, impairing private contracts, making a person judge in his own cause, taking property from one and giving it to another: authority to make such laws is not among the powers intrusted to legislatures. They cannot revoke their own grants. Terret v. Taylor, 9 Cra. 45; United States v. Arredondo, 6 Peters, 728. Even a constitutional power unreasonably exercised, this court has declared would be void. Jackson v. Lamphire, 3 Peters, 280. Whether an act of legislation must be contrary to the constitution as well as first principles, and whether *all* ex post facto legislation of the states is void, are questions upon which the federal judges have not been perfectly agreed. Judge Chase affirms these positions; Judge Iredell denies them in Calder v. Bull, 3 Dall. 388, 389; Judge Patterson's argument in Vanhorn v. Lorrance, strongly implies his agreement with Judge Chase, with whom Chief Justice Marshall agrees; indeed, it appears to be the judgment of the court, in Fletcher v. Peck, 6 Cra. 132, 133, 135. It is denied by Judge Washington in Beach v. Woodruff, Peters's C. C. Rep. 6; and in Satterlee v. Matthewson, 2 Peters, 413: yet he appears in principle to acknowledge it in Ogden v. Saunders, 12 Wheat. 266, 267. In Fletcher v. Peck, 6 Cranch, 143, Judge Johnson strenuously asserts, that the constitution of the United States forbids all ex

post facto legislation, civil as well as criminal; as he does again in 12 Wheat. 286, and in his elaborate note in the appendix to 2 Peters, 281. The same ground is most ably occupied by the supreme court of New York in Dash v. Van Kleeck, 7 Johns. 493, 501, 509; and in Stoddard v. Smith, 5 Bin. 370, Judge Brackenridge says, that the notion of confining ex post facto to criminal laws, is merely American. Certainly such is not the language of the constitution, nor the spirit, the reason, or the policy. At least, when states are parties to a contract, they ought not to be permitted to enact ex post facto laws concerning it. The supreme court of Massachusetts in a late case have added an able argument to their judgment against it. Picquet's Case, 5 Pick. Rep. 65.

The acts in question take private property, and apply it to public use, without just compensation; and for injury thus inflicted, they refuse remedy according to due course of law. It is the common law of all nations, that private property cannot be taken by an act of state, without individual consent or judicial umpirage. Vanhorn v. Dorrance, 2 Dall. 314; Picquet's Case, 5 Pick. 65; Pickering v. Rutty, 1 Serg. & Rawle, 511; Hallam's Constitutional History, 36. In France the charter requires indemnity to be paid before the property is taken. In no country, it is submitted, can even a tax be imposed upon one individual alone.

The acts violate the right of trial by jury; any process to enforce the lien would have called in the heirs, who might have pleaded payment, release or satisfaction, which would have been tried by jury. The court had power, and it is every day's practice, to direct issues to try facts after judgment. Wherever there is a court of chancery, that might have interposed. But in Pennsylvania there is no such court, though its principles are recognized and administered. Pollard v. Shaffer, 1 Dall. 214; Ebert v. Wood, 1 Bin. 217; Murray v. Williamson, 3 Bin. 135; Jordan v. Cooper, 3 Serg. & Rawle, 578. The charge denies that there was any fact to try, or that Nicholson's property suffered for want of jury trial. But it is submitted that the state might have been compelled to prove as a fact, how much Nicholson remained indebted, if any thing. Legal representatives, creditors, terre-tenants, might have applied to the courts, on motion, to question the lumping sales, arbitrary compromises, compulsory

partitions, extravagant charges, and other impositions which are inflicted by the obnoxious acts. The heirs of Nicholson contend, that, on a full settlement of accounts, he owes her nothing. Yet all his estates were confiscated without satisfying her alleged demand, though it is said that there was no question to try, nor any injustice to complain of.

By his contract with the state, Nicholson was entitled, not merely to judicial enforcement of the lien, but to the established methods of execution. The common law, vouchsafing land from execution, was repealed in Pennsylvania as early as 1705, by a statute which makes many careful and tender provisions to protect debtors from harsh and hasty proceedings. This long established law is familiar and dear to the people of that state, and must have been contemplated by both parties when this lien was arranged. 1 Dallas's Laws of Pennsylvania, 67; 1 Smith's Laws of Pennsylvania, 57. Every execution, it is expressly provided, shall be like the English elegit. Inquisition and condemnation are indispensable. The charge calls this a boon, which the state might revoke at pleasure, and asks who suffered for the want of it in this instance. If it is in the contract, that question does not meet the difficulty, though it is easily answered. Nicholson's family and creditors, and the state, all suffered by its extra-judicial confiscation of his lands. If, instead of being sacrificed at commissioner's sales, they had been sold by due course of law, with all its benignant delays and methods of execution, with opportunity of applying to court to regulate them, and of writ of error to the highest court, there was property enough to have paid all that the state or private creditors demanded of Nicholson, and to have left a principality for his family.

Sales in mass, and not by parcels, as these acts require, are contrary to the established practice of Pennsylvania. Rowly v. Webb, 1 Bin. 61; Ryerson v. Nicholson, 2 Yeates, 516.

By the acts in question the commissioners were empowered to average, compromise, seize and sell all the lands at any sacrifice, buy at their own sales, compel partition, seize all Nicholson's private papers wherever found, the asylum company are compelled to give up his shares, and the commissioners are stimulated by a bounty of ten per cent on all the confiscations. An act of legislation assumes that an individual

is indebted, assumes a lien for the debt, decrees confiscation of all his estates, enacts a title to purchasers, and forbids all judicial revision. The second section of the act of 1807 declares that the proceedings thus consummated, shall be but prima facie evidence of the grantee's title. It is a title by forfeiture, the infirmity of which is acknowledged by the very act of its creation, which invites judicial ascertainment. But that act excluding all direct means of such ascertainment, none other is left but such as the present action, to determine collaterally the validity of the acts of assembly, thus shown to be unconstitutional and void.

2. It is denied that the state had any lien against Nicholson, or that he was indebted to it at all; to prove which, his family relied on the treasury books and the following acts of assembly, to show that his accounts remained unsettled when he died in the year 1800, viz. Act of 20th April 1794, 3 Dal. Laws of Penn. 790; Act of 4th April 1796, sect. 12, 4 Dal. Laws of Penn. 66; Act of 5th April 1797, sect. 1 and 8, 4 Dal. Laws of Penn. 175; Act of 4th April 1798, sect. 1 and 6, 4 Dal. Laws of Penn. 268; Act of 11th April 1799, sect. 4 and 7, 4 Dal. Laws of Penn. 488.

Notwithstanding these provisions, those of the acts of 1782 and 1785, and the exclusive keeping of all Nicholson's papers, of which the state possessed itself, there never was a legal settlement of his accounts, which remain open on the treasury books to this day, and no one can tell upon what settlement the state relies, whether fiscal or judicial. The first judgment of the state, entered the 18th December 1795, was obtained in a suit brought before Nicholson was out of office, in which no execution ever issued, and which expired for want of revival. The fiscal settlements, dated in 1796, are all on stock balances, carried to new accounts, without any settlement in money, as the law requires. They are, therefore, but liquidations of particular accounts, and not a balance of all the respective demands between the parties, struck in money. The agreement of attorneys, by which the judgment was confessed in 1797, stipulates for future settlements, which precludes the idea of actual settlement. The question then is, whether, and how the state got the lien which it assumed.

Lien is a privilege strictissimi juris, a preference, hold or

incumbrance, in the nature of a judgment, not favoured in law, nor to be extended by construction. It is dormant, cautionary and incapable of activity, till put in force by another impulse. It is not specific like a mortgage, jus in re, but general, merely ad rem. It does not levy, dispossess or put in possession, and has none of the properties of execution. Gibbs v. Gibbs, 1 Dal. 371; Blair v. The Ship Charles Carter, 3 Cranch, 332; Thellusson v. Smith, 2 Wheat. 396; Conard v. The Atlantic Insurance Company, 1 Peters, 442. Liens, being in derogation of common law, are to be construed strictly, and enforced literally. With respect to them, form is substance. The twelfth section of the act of 1785, 2 Dal. Laws of Penn. 251, requires that in order to constitute a lien, there must be, 1, debt; 2, settlement; 3, by the proper officers; 4, in the prescribed manner; 5, with notice to the debtor; 6, the whole of whose accounts must be settled; 7, and the balance struck in current money; 8, that balance reported to the executive; 9, and entered at large in the treasury books. Not one of these requisites can be shown in the alleged settlement.

The difficulty the plaintiffs have to contend with here is not construction of the various provisions of the acts of assembly, which all speak a clear and satisfactory language, but an adverse decision of the supreme court of the state in the case of Smith against Nicholson, 4 Yeates, 6, which decision the circuit court adopted as right in itself, and binding the judgment of that court, even though wrong. It was an abstract question, stated and submitted by agreement of parties, to which the legal representatives of Nicholson were not a party; nor was it determined in the highest court of the state, which at the time of that decision was the high court of errors and appeals, since abolished. It would not therefore be binding even in the courts of the state; Bevan against Taylor, 7 Serg. & Rawle, 401. In a controversy between a state and one of its citizens, a court of that state should not deprive him of the benefit of the revision of the supreme court of the United States, provided the case be such as to give the latter jurisdiction. If the laws in question should be deemed invalid by this court, it cannot surrender its judgment to that of the state court. The series of its adjudications on this subject is as follows: M'Kean v. Delancy, 5 Cranch, 32; Mutual Assurance Society v. Watts's Executors, 1 Wheaton, 290; Ship v. Miller, 2 Wheaton,

325; Thatcher v. Powel, 6 Wheaton, 127; Elmendorf v. Taylor, 10 Wheaton, 159; Jackson v. Chew, 12 Wheaton, 162; Inglis v. The Trustees of the Sailors' Snug Harbour, 3 Pet. 127; Henderson v. Griffin, 5 Pet. 155; Cathcart v. Robinson, 5 Pet. 234; Taylor v. Thompson, 5 Pet. 368; Hinde v. Vattier, 5 Pet. 401; Ross v. M'Clung, 6 Pet. 283; Green v. Neal, 6 Pet. 291.

The principles to be extracted from all these cases are, that they are binding only when they establish general rules of property, perhaps of evidence, adjudged in the highest state courts, and being, like the common law or acts of assembly, uniform and universal in their operation. But though binding they are not conclusive. This court is to examine and judge for itself. If the courts of the United States surrender their judgment to those of the states, it is a concession of vast amount. Respect is due, uniformity is desirable; but submission would take from the courts of the United States their supremacy and usefulness. Even state legislation has never been suffered to change the practice of the federal courts. Wayman v. Southard, 10 Wheaton, 1. The case of Smith and Nicholson not having been adjudged by the highest court of the state, not establishing any general rule of property or of evidence, and not adjudging the question presented by this case, is therefore not a binding authority. In that case the question of settlement was taken for granted, together with that of notice; and all the other positions contested in this case, except whether the governor's sanction is indispensable to him. The general construction and operation of the act of 1785, in connection with all the other acts of assembly which tend to explain it as now submitted, was never presented.

If, notwithstanding these views, this court should uphold the lien, it becomes necessary to inquire whether it had not expired before the acts of 1806 and 1807 assumed its existence. The judgment of 1795 expired in 1802, for want of scire facias to revive it. The judgment of 1797 is inconsistent with the fiscal lien of 1796; for can there be two liens for the same debt? lien is a thing incompatible with another title, it is a single hold or incumbrance excluding all other rights of other claimants, and all other claims of the same claimant, to the thing bound by the lien. A lien claimant loses his lien by let-

ting go of it for an instant, or by taking other security for the debt. Kaufelt v. Bower, 7 Serg. & Rawle, 73; Cranston v. The Philadelphia Insurance Company, 5 Bin. 540; Ramsey v. Allegre, 12 Wheaton, 612; Collins v. Ongley, 3 Selwyn, N. P. 1163. There may be double security and several remedies, as bond and mortgage, or covenant and distress; Gordon v. Correy, 5 Bin. 552; Bantleon v. Smith, 2 Bin. 146; but there cannot be two liens for the same thing. It is not a question of extinguishment but of election. The state was bound to choose and did choose, relying on the lien by the judgment of 1797, which gave a plain and adequate recourse, instead of the fiscal settlement of 1796, which was involved in doubt and difficulty. The fiscal lien never was set up until several years after Nicholson's death, when it was found that the lien of the judgment proved abortive. The only reliance was that judgment, and that was suspended or satisfied in law by several of the executions under it; one of which was staid by the plaintiff's order, another not executed by order of the comptroller-general of the state, and a third levied on real estate which was subjected to inquisition, condemnation, and venditioni exponas, yet outstanding. The general rule of law and reason under such circumstances is that the debt is discharged. Little v. Delancy, 5 Bin. 267. The whole liability is transferred to the sheriff.

It may be moreover alleged that the state has a lien by Nicholson's death insolvent. But first, there is no proof that he died insolvent; and secondly, if he did, all debts due to the commonwealth of Pennsylvania are postponed to all other debts by the fourteenth section of the intestate act of 1794. 3 Dal. Laws of Pennsylvania, 357; 3 Smith's edition of the Laws of Pennsylvania, 145. The lien was but a debt, in which case it has been settled by the courts of that state, that it must take its place after certain other debts. Moliere v. Noe, 4 Dal. 450; Scott v. Ramsey, 1 Bin. 221. There were many judgments and liens of individual creditors preceding those of the state, which by law outrank it; and indeed it was to forestall those very creditors when their advantages were ascertained, that the legislature recurred to the fiscal lien of 1796, which the acts of assembly assume.

Lastly. There are four exceptions on points of evidence.

1st. The journal of the house of representatives of Pennsylvania was offered to prove that the same sums and the same stock as claimed under the alleged fiscal lien were claimed in the action of trover. 2d. The same journal was offered to show the report of a committee to the same effect. 3d. The appendix to another report of a committee was offered to show that Nicholson's accounts were unsettled. All this testimony was rejected. Office registers, church registers, and parish registers are received in evidence as public documents made by disinterested persons. The books of any public corporation are evidence of its acts and proceedings. Owings v. Speed, 2 Stark. Evid. 177, 5 Wheat. 420. Why, then, are not the acts of the constituted authorities of a state evidence against it? The state took defence in this case; and can it be a well founded objection, after several laws of the state were read in evidence, that the proceedings of committees of the legislature were not also evidence, because they had not become enactments? The case of Kelly v. Jackson, 6 Pet. 630, is supposed to settle this point.

The ledger of the treasury was offered to show that the accounts between the state and Nicholson remain unsettled, and rejected on the ground that the ledger is not a book of original entries, and that the accounts are incomplete. But as the state was defending its grantees the defendants, proof from any book or account kept by the officers of the state, whether original or not, and however incomplete, would be good evidence against the state. The error in ruling this point must be imputed to a misapprehension that the ledger was offered by the state, instead of being offered against it.

Mr Binney, for the defendants in error, stated that Mr Sergeant and himself appeared in support of the judgment of the circuit court, by the appointment of the governor of Pennsylvania, under certain resolutions of the legislature.

The case in that court was an ejectment by the heirs of John Nicholson for two tracts of land in Franklin county, the title of which was admitted to be in them, unless divested by certain alleged liens and proceedings of the state of Pennsylvania. By agreement the proceedings by the state were to be set up as a defence, and the question whether the title of

John Nicholson and his heirs was divested by them, was to be brought forward and submitted on its merits. The case therefore turned upon this defence, the history of which may be briefly stated.

In March and December 1796, certain accounts between the state and John Nicholson were settled in the department of accounts, by which he was found a debtor to the state in large amounts. On these settlements the state claimed to have a lien on John Nicholson's real estate throughout the commonwealth. In December 1795 and March 1797, the state obtained judgments against him for large sums. On these judgments a similar lien was asserted. In 1806 and 1807, the legislature passed two acts authorizing commissioners under a warrant by the governor to sell the lands of John Nicholson in satisfaction of these liens. At sales under this process, the defendants bought and entered into possession, and continued in possession more than twenty-one years without question, the youngest of the children of John Nicholson having been of age twelve years before the institution of the ejectment, and four of them having been of age at the time of the sales.

The plaintiffs contended, 1. That none of the accounts were so settled as to have become valid liens. 2. That the judgments were not a lien. 3. That the acts of 1806 and 1807 were unconstitutional and void. The charge was on all the points to the contrary; and the opinion of the court was also adverse to the plaintiffs in overruling certain matters offered in evidence, and to be hereafter noticed. The questions consequently are, whether there is error in the court's opinion either in charge to the jury, or in rejection of the offered testimony.

The acts of assembly of Pennsylvania which bear upon the subject, require to be more particularly stated.

At all times, before as well as since the revolution, Pennsylvania has had a special tribunal for the settlement of public accounts concerning her revenue and expenditures. Prior to the act of the 13th of April 1782, this tribunal consisted of three auditors named by the assembly, whose certificate was conclusive in an action against the debtor. Act of 1st March 1780, sect. 5, M'Kean's ed. of Laws, 287. On the 13th of

April 1782, an act was passed to establish the comptroller-general's office, 2 State Laws, 44. In this office all public accounts were to be settled, and then transmitted with the vouchers to the supreme executive council. If approved by the council, and a balance was found due by the state, a warrant was to be drawn by the president of the council upon the state treasurer. If a balance was found due to the state, it was made the duty of the comptroller-general to take the most effectual steps to recover it, by filing a certificate of the debt in the office of the prothonotary or clerk of the county court, and taking a warrant against the body, and distress against the goods, and if there were none, then a fieri facias against the debtor's lands. The act makes no express provision for non-approval of the settlement by the council. It gives neither appeal from the council, nor trial by jury to the debtor, and it does not make the settlement a lien. By this act John Nicholson was appointed comptroller-general.

On the 18th February 1785, an act was passed, entitled "An act to give the benefit of trial by jury to the public officers of this state, and to other persons who shall be proceeded against in a summary manner by the comptroller-general of this state." It allows an appeal by the debtor to the supreme court within one month after notice of a settlement approved by council, upon his giving security in the nature of special bail to prosecute the appeal; and as a necessary counterpoise to the right of appeal, the twelfth section enacts, "that the settlement of any public account by the comptroller, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all the real estate of such person throughout this state, in the same manner as if judgment had been given in favour of the commonwealth against such person for such debt in the supreme court." 2 State Laws, 247.

The law of Pennsylvania thus remained until the 28th March 1789, when an act was passed "for the appointment of a register-general, for the purpose of registering the accounts of this state." 2 State Laws, 704.

This act was the commencement of an effort to introduce into the accounting department a check on the power of John

Nicholson, of whom the assembly became jealous, and whom they had not the power to displace. It directed the comptroller-general to submit all accounts before he settled the same to the register-general, and to take his advice in making such settlements; but the act was defective in several points, and especially in not requiring that the vouchers should be submitted with the accounts.

A supplement was passed on the 30th September 1789, 2 State Laws, 751, to remedy this defect; and it ordered the comptroller-general to state, adjust, and strike the balance, and to report his opinion with the vouchers to the register-general, and to take his advice before final allowance.

This act was defective as well as the former, in making the office of the register-general merely advisory, without providing for a difference of opinion, or obliging the comptroller-general to follow the advice given, which it may be presumed, from what follows, that he showed no disposition to do.

The act of 1st April 1790, 2 State Laws, 787, was then passed, which, as to all subsequent accounts, directed the register-general in the first instance to examine, liquidate and adjust them, and afterwards to transmit them with the vouchers to the comptroller-general for his examination and approbation. If they agreed, the register was to transmit the account and vouchers as before to the council. As this act made the register-general the officer to settle public accounts, the fifth section enacted that "all such settlements of accounts shall have the like force and *effect*, and be subject to the like appeal at the instance of the party, as settlements heretofore made by the comptroller-general."

The law stood thus at the adoption of the present constitution of Pennsylvania on the 2d September 1790, when a single executive having been substituted for the council, successive acts of 14th January, 13th April, and 21st September 1791, 3 State Laws, 3, 73, 113, were passed, to give to the governor the power of performing all duties enjoined upon the council by former acts of assembly, and among others, that of revising and approving or disapproving the settlements of public accounts; but the last mentioned act provides, that all future accounts settled by the comptroller and register, or either of them, shall be referred to the governor for his approbation, only

when they differ in opinion; and that in all cases where they agree, "only the balances due on each account shall be certified to the governor, who shall thereupon proceed in like manner as if the said accounts respectively had been referred to him according to the former laws upon the subject." By this act the governor was authorized "in like manner and upon the same conditions as heretofore," to allow appeals, or to cause suits to be instituted.

On the 4th April 1792, a further act was passed, entitled "An act to provide for the settlement of public accounts, and for other purposes therein mentioned." It was in the main a condensation of the existing system of accounts. It repeated several provisions then in force, added others not material, and repealed "so much of any former act as was thereby altered or supplied, and no more." The second section enacted, that when accounts were finally settled, either by the comptroller-general and register-general, or in case of their disagreement, by the governor, the comptroller and register were each to enter the same in suitable books, and upon such entry jointly to certify the balance, and the fund out of which it was payable, to the governor, who was to draw his warrant upon the treasurer for the amount.

John Nicholson continued comptroller-general under this system until the 11th April 1794, when he resigned his office.

But one act in regard to the settlement of accounts remains to be noticed. It was passed on the 20th April 1795, and is entitled "An act to provide for the settlement of the accounts of John Nicholson, late comptroller-general." 3 State Laws, 790. It authorizes the *comptroller-general* to employ clerks in adjusting John Nicholson's accounts, and as often as the accounts, or such parts of them as are independent of other parts, have received his approbation, it requires him to transmit them to the register-general, to be proceeded on as is directed in case of other accounts. It further requires the comptroller and register to make separate reports to the next session, of their progress in the settlement of these accounts.

In this state of the law, the three accounts which are in question were settled. The first was on the 3d and 8th March 1796, in which the comptroller-general preceded the register. This was during the next session of the legislature, after the

act of 20th April 1795. The second was on the 20th and 22d December 1796, in which the register preceded the comptroller. The third was on the 20th December 1796, in which both officers signed on the same day.

I. The court charged the jury, "that these accounts between John Nicholson and the commonwealth or some of them, were so settled and adjusted, that the balances or sums of money thereby found due to the commonwealth, were good and valid *liens* on all the real estate of John Nicholson throughout the state of Pennsylvania."

This is a pure question of law, turning, 1, on the accounts produced by the plaintiffs themselves, and 2, on the acts of assembly already stated, and they will be examined in this order.

1. The accounts produced.

If any accounts settled by the register and comptroller-general have the *lien* attributed, it is supposed that these have it. A few characteristics of them will be shown, and then the objections will be noticed. It is sufficient for the judgment, if some one of them had a lien. The court was not asked to say which of them, nor whether all had. It was indeed immaterial if any one of them had it; but it will be contended to have been the effect of each one of them.

They were settled by the register and comptroller-general, with whom, by the acts of 4th April 1792, and 20th April 1795, this power was deposited; and they agreed.

They were settled in due official order. If the act of 20th April 1795 is wholly inoperative, or if its operation continued beyond the session of 1795—1796, still there are two accounts which are settled by these officers in the proper order of precedence. If the register must examine first, he has so signed the account of 20th and 22d December 1796, and the court in support of an official act, will intend that he first examined and signed that account which presents the same date to both signatures. If the comptroller must examine first according to the act of 20th April 1795, he has so signed the account of 3d and 8th March, and it will be for the same reason intended that he signed and examined first the account of 20th December.

If the act of 20th April 1795 only suspended the usual order

of examination until the end of the next session, which is its true construction, then all the accounts are settled in due order. The order, however, is immaterial, as both officers are empowered by law to perform the same acts, and both have performed them.

They find a balance or sum of money due by John Nicholson to the commonwealth. The question is not whether it is regularly due, but whether the settlement *finds* it to be due, of which there is no doubt. The clear meaning of the accounts on their face, is, that there is a balance found due by John Nicholson to the commonwealth. The account settled is the "settlement of an account." Interpreted as all accounts should be, expressing in the short language of accounts a well known meaning, they find John Nicholson a debtor to the commonwealth, in the sums necessary to balance the accounts. No court wants an interpreter to explain this. It is the plain and universally understood language of accounts; and what it means is no more a matter of disputable fact, than what the Arabic numerals in the columns mean. The account thus settled, is what the act means to describe as "the settlement of an account whereby a balance shall be found due." No other terms or finding can be necessary. The finding is the settlement, and the settlement is the account settled. The balance of each account is a sum of *money* with which he is charged, because the items of debit which exceed the credits, are sums of money, and the account is a money account in the lawful currency of the day of settlement, and not in the currency in which the certificates charged were themselves expressed. One of the accounts is doubtless in regard to continental certificates, but they are estimated and charged at a certain price, in the then money or currency of the country, according to the authority given to the accounting officer, by the act of 13th April 1782, to charge the value of public property and effects not accounted for. *Continental certificates account*, is merely a denomination of the particular account, to show the origin of charge and discharge. *Merchandise account*, *stock account*, *funded debt account*, are not the less accounts in *money*, because they are so headed in the ledger. So of *account in continental certificates*, or *three per cent stock account*, which is the language of these settlements.

Whether they are charged at too high a rate or otherwise, is no question here.

Finally, they are *public* accounts, and thus complete the description in the act of 1785.

The objections to this view are the following.

The balances were not certified to the governor according to the act of 21st September 1791. The answers are, First, that this was unnecessary when a balance was found due *to* the commonwealth. The object of the certificate was, that the governor might proceed in like manner as if the account had been referred to him according to *former laws*. The act of 13th April 1782, sect. 2, is the only act which regulated the proceeding, namely, that when a balance was due *by* the state, the executive was to draw a warrant on the treasurer, and when due *to* the state, that the comptroller should take steps for speedy recovery. The act of September 1791 did not mean that the comptroller and register should certify a balance to the governor, upon which he was to do nothing. Secondly, if the certificate was ever necessary in such a case, it was not to give the lien. The certificate was first required by the act of September 1791. The lien is given by the act of 1785. The lien, if it attaches at all, does so immediately. There is no limitation of time to the certificate. If the omission to transmit it has any effect, it is merely to keep the appeal open, or to suspend the charge of interest. But there is no question here either as to appeal or interest. The lien is, and always has been, independent of both.

The acts suppose but one settlement on which the lien is to arise, and here are several, and after all there were still accounts unsettled between the parties. The answers are, First, that no act requires, or supposes all accounts to be settled at once, nor is it reasonable, unless they are dependent parts of the same account. The accounts in question purport, two out of three, to be independent accounts, and the third is but a continuation of one of the former, in consequence of a payment by the debtor, which changed the balance. Secondly, non constat, there were other accounts between the parties at that time. Thirdly, the act of 20th April 1795 authorizes a separation of the accounts into independent parts. Fourthly, the lien, if it exists, belongs to

the final settlement of an account, not to the settlement of a final account.

The accounts were not entered in the books of the register and of the comptroller-general, according to the second section of the act of 4th April 1792. The answers are, First, that if necessary by law, it must be presumed they were so entered, as it was the duty of the officers, and it does not appear but that they performed it. Secondly, the accounts on their face, show that they were entered at the date of the settlement. The memorandum on the account of 20th December 1796, that it was not entered until June 1800, was shown by the evidence to be an interpolation by a stranger. Thirdly, the entry in the books is no part of the settlement, nor connected with it. The design of it was exclusively fiscal, to show the resources of the commonwealth, and her liabilities, by an index of her debts and credits.

No notice of the intended settlement was given to the debtor. The answers are, First, that notice was not necessary by the act. It was made the duty of the debtor to submit his own account for settlement, and it is to be presumed that he did. Secondly, if necessary, the presumption of law after such a length of time, and nothing appearing to the contrary, is, that the officers did their duty. This presumption is made on the principle of quieting possession, of sustaining official acts, and of supposing that things which it would have been culpable to omit, were rightly done. Hillary v. Waller, 12 Ves. 252, 226; Eldridge v. Knott, Cowp. 215; Pickering v. Stamford, 2 Ves. Jun. 583; King v. Long Buckley, 7 East, 45; Society v. Young, 2 N. Hamp. Rep. 310; Brown v. Wood, 17 Mass. 72; Hartwell v. Root, 19 Johns. 345; Williams v. East India Company, 3 East, 192; Monke v. Butler, 1 Roll. Rep. 83; King v. Hawkins, 10 East, 216; King v. Verelst, 3 Campb. 432; Taylor v. Cook, 8 Price, 653; Wilkinson v. Leland, 2 Peters, 660; Ex parte Bollman, 4 Cranch, 129; Willink v. Miles, 1 Peters's C. C. Rep. 429; United States v. Batchelder, 2 Gall. 16; Fales v. Whitney, 7 Pick. 225; Starkie on Ev. 4th part, 1250. Thirdly, the public act of 20th April 1795, was notice. And lastly, the accounts produced on the plaintiff's subpœna to Harrisburg, were proof of actual notice. They bear date before the two settlements in December 1796, and were preparatory to them. Possession

of these by John Nicholson and his counsel, which was in undisputed proof, was such evidence of notice, that being uncontradicted, the court was entitled to say to the jury, that they ought to suppose notice. It is not admitted that the judge was asked to leave notice to the jury as a matter of fact.

The settlements were merged in the judgment of March 1797. *Transit in rem judicatam.* The answers are, First, it is not shown that the judgment was for the same debt as the settlement, nor was the court asked to instruct the jury upon that hypothesis. This court will not infer a fact from the mere similarity of items, to involve the circuit court in error. Secondly, the doctrine of extinguishment, as drawn from the principle *transit in rem judicatam*, applies only to the very cause of action in suit, and does not affect collateral securities or collateral concurrent remedies. The cause of action in that suit was not the settlement, nor the settled account, but the trover and conversion of certain certificates of stock. The settlement remains as it was, with all its incidents and securities. Had the cause of action been the debt due, it would not have altered the case. The settlement remained, and if a lien attended it, the lien also remained. A judgment without satisfaction is not an extinguishment of a collateral remedy for the same cause of action. Chipman v. Martin, 13 Johns. 240; Bantleon v. Smith, 2 Binn. 146; Day v. Seal, 14 Johns. 404; Gordon v. Corry, 5 Binn. 552; Houldebil v. Desanges, 2 Stark. N. P. C. 337; Lenox v. M'Call, 9 Serg. and Rawle, 302; Drake v. Mitchell, 3 East, 258.

The settlements were waived by bringing tort for the stock, and the contract of the accounts cannot now be set up. The answers are that the identity of the demands is not established by evidence; that if it were, it was the duty of the debtor to avail himself of the objection by pleading the settlements. Not having done so, he is in the case of a defendant who suffers judgment both in tort and contract for the same thing. All he can object to is double satisfaction, and that question does not arise. The judgment in trover is not a waiver of the settlement, because it is entirely consistent with it, both proceeding upon the ground of converting or not accounting for the public money. The conflict between tort and assumpsit springs from forms of action, and is entirely technical.

2. These accounts then having been duly settled, and followed by a lien as much as any accounts could be, the question arises whether any accounts settled in 1796, agreeably to the acts of assembly then in force, were attended by a lien.

A lien was at one period given to a settlement in the accounting department beyond doubt. It has never been expressly repealed, nor has the law been expressly supplied or altered in this respect, so as to bring the twelfth section of the act of 1785, within the repealing clause in the eleventh section of the act of 1792. The question then is, whether the system of accounting has been so changed, as that the security intend- and given by the act of 1785, has become impracticable and is lost. The objections to such a view of the law are not easily obviated. The *lien* was given as a counterpoise to the right of appeal. The act of 1785 is an act giving and regulating appeals and the lien. There is no other subject introduced into it. Now the whole of the act, so far as it regards appeals, must be admitted to have continued in force, until after these settlements. An appeal continued to be the express right of the debtor under every subsequent modification of the law, and yet the act of 1785 was the only act to regulate the subject, until the act of the 20th of March 1811, Purdon, 764. The continuance of this part of the system is a powerful argument in favour of continuing the lien to the commonwealth, which alone reconciled the appeal with the public interest. The security of special bail was inadequate. The present accounting system of Pennsylvania, under the act of 1811, continues to connect appeal and lien together.

The *lien* given by the act of 1785, belongs moreover to a settlement in 1796 by necessary implication, and also by express enactment.

First, by implication. In 1782, the department of accounts consisted of the comptroller, with a power of revision in the executive. The comptroller alone settled. The executive did not settle. The comptroller pronounced the judgment; the council approved or disapproved, and in the former case left the settlement in force as the judgment of the comptroller. This is the clear language of the act. The act of 1785 speaks in the same terms. The appeal is from the comptroller's settlement, from his award, and not from the council's confirmation. The act of March 1789 is to the same effect. Before

the comptroller shall *finally settle* an account, in pursuance of former laws, he is to transmit it to the register. The comptroller then was deemed to settle the account finally. The acts of 30th of September 1789, and 1st of April 1790, repeat the provision. Further, when we recur to the twelfth section of the act of 1785, we perceive that the lien is given to the *settlement* by the comptroller confirmed by the council, but not to the confirmation of the council. It is given to the comptroller's settlement perfected according to law. The virtue of the proceeding is in his settlement sanctioned by the council, but not in the sanction of the council. In case of appeal it is his settlement that is established by the court, and not the sentence of confirmation by the council. The lien is given to that adjudication which finds the balance to be due, namely, the settlement by the comptroller, and not to the confirmation by council, which does not find any thing due, but only establishes the settlement. If we find then, as we do, that the sanction of the governor under the constitution of 1790, is substituted for that of the council under the constitution of 1776, and afterwards that in a certain event which exists in this case, to wit, the approbation of another officer, the executive sanction is superseded, it follows by necessary implication, that the settlement, either with the substituted sanction, or with no sanction at all, is perfected to the same extent that was required by the act of 1785 to produce the lien. It is to be recollected that the act of the 1st of April 1790, which makes the register-general the settling officer, declares that all settlements by him shall have the like force and effect as settlements before that time made by the comptroller. If therefore, a settlement by the comptroller after the change in the constitution, and the substitution of another sanction for that of the governor, would have given the lien, a settlement by the register approved by the comptroller, must do the same.

Secondly, by express enactment. The eleventh section of the act of 4th of April 1792, by repealing no part of any former act except such as is by that act altered or supplied, transfers all the efficacy of the acts of 1782, 1785, 1789, 1790 and 1791, to settlements under the act of 1792, which these were. The act does not alter or supply the provisions in regard either to appeal or lien. It alters certain accidents of the settlement,

its form and the order of its parts, and supplies new provisions for them; but it expressly retains all those acts and parts of acts which give force, effect and substance to it.

These views are sustained by the general rules of interpretation, applied to several statutes in pari materia, and particularly to affirmative statutes, made for the public security. They should be so construed as to retain the benefit of that security, which was essential to the public, to which there is nothing repugnant in any part of the old system, and which has been expressly continued in the new. These statutes are to be taken into the construction of one another, and to be interpreted as if they were different sections of the same statute. Earl of Aylesbury v. Patterson, Doug. 30; Wallis v. Hodson, Barnard. Chan. Rep. 276; Anon. Lofft, 398; Foster's case, 11 Rep. 63; Chapman v. Pickersgill, 2 Wils. 146; New River v. Graves, 2 Vern. 431; Eyston v. Studd, Plowd. 467; Yale v. King, 19 Vin. Ab. 517; Statutes, E. 6, 58; Plummer v. Whichcot, Tho. Jones, 63; Thornby v. Fleetwood, 10 Mod. 118; Johnes v. Johnes, 3 Dow. 15; Alcheson v. Everit, Cowp. 391.

The suggestion that this lien was taken away by the intestate law of the 19th of April 1794, which among creditors in equal degree postpones the commonwealth to the last, is wholly without foundation. That act does not disturb any lien, except in the case of a sale by order of the orphan's court, and then the court gives the lien creditor his priority by distribution of the proceeds. Moliere v. Noe, 4 Dall. 450; Girard v. M'Dermot, 5 Serg. and Rawle, 128.

This court will however, regard the charge of the circuit court on the first point, as to the lien of these accounts or some of them, as sustained authoritatively by the decision of the supreme court of Pennsylvania. The case of Smith v. Nicholson, 4 Yeates, 6, in the year 1803, judicially affirmed the lien of these accounts, that case having presented precisely the same issue of law upon the same facts; and as it is a decision of the highest judicial tribunal of Pennsylvania, upon the interpretation of a statute of that state, this court will receive it as an authoritative exposition of the state law. The same interpretation was recognised and adopted by the same court, in the United States v. Nichols, 4 Yeates, 25, and it has been universally acquiesced in with the exception of this

suit, for thirty years. The state has legislated upon that basis. Purchasers have bought and parted with their money in faith of it. The judgment creditors of John Nicholson, have one and all from that time yielded their priority to the commonwealth; and it is only by this acquiescence, and the consequent omission to pursue their executions, that an acre of land in Pennsylvania, has been left to his heirs, to raise the present question. To examine the arguments of either the counsel or the court in the printed report of that case, and to weigh or sift the reasons to ascertain whether they are unanswerable, or the best that could have been given, would be both invidious and at variance with the law of this court, which adopts the state decision in such cases, not because it is abstractly right, but because it is the unreversed decision of the highest state court. Shipp v. Miller's heirs, 2 Wheaton, 325; Jackson v. Chew, 12 Wheaton, 168; Green v. Neal, 6 Peters, 291. "A fixed and received construction of a statute by a state in its own courts, makes a part of the statute law."

II. The charge that the judgments were liens throughout the state of Pennsylvania, was in accordance with the settled law of its courts. White v. Hamilton, 1 Yeates, 183; Ralston v. Bell, 2 Dall. 158; Act of 5th March 1790, 2 State Laws, 771, sec. 2; Act of 18th February 1785, 2 State Laws, 221, sec. 12. The law so remained until the act of 20th March 1799, sec. 14, 3 Smith's Laws, 358. The objections made in this court, that the defendants cannot have the benefit of these judgments in the deduction of title, because they are not referred to in the acts of 1806 and 1807, and because the liens were lost for want of a scire facias within five years, according to the act of April 1798, and further, because the largest judgment is interlocutory, are untenable. The acts of 1806 and 1807 speak of liens generally, embracing all liens for the debts of John Nicholson. The act of 1798 does not require a scire facias in such a case. Executions had been issued. Young v. Taylor, 2 Binney, 218; Pennock v. Hart, 8 Serg. and Rawle, 376. The object of the act was to protect purchasers, and, at most, other creditors. As to the judgment debtor and his heirs, the lien is perpetual. The judgment of 1797 was in its terms final and conclusive, unless errors should be shown within the time limited; and no such errors were ever shown.

III. The third point of the charge involves the validity of the acts of 1806 and 1807.

An allegation that the statutes of Pennsylvania were, at the date of these acts, or at any time, designed to prostrate the constitution and the law, cannot receive the countenance of this court. The fidelity both of her legislature and courts, to the constitution and the law, their intelligence in comprehending them, and their deference to the constitutional umpirage of this court, are, and uniformly have been, equal to those of any other state in the union. In regard to the estates of John Nicholson, the act of 4th April 1805, 7 State Laws, 272, which authorizes the sale of the state lien and debts to members of his own family, with a credit of ten years for payment of the amount, and which failed from the entire incompetency of those estates to furnish the security, is an evidence of unsurpassed tenderness to a public debtor, and irrefutable proof that the acts in question were not passed with that purpose of aggression upon either public law or private rights, which it has been the plaintiff's effort to establish as their motive.

The consideration of the acts of 1806 and 1807 must be imperfect, unless it is connected with the state of circumstances at their enactment. The demands of the state had been established according to law, namely, by final settlement in the department of accounts, and by confession of the party, in the highest court of original jurisdiction in the state, with the fullest opportunity of trial by jury in both cases. The debtor was dead, and his heirs had removed to Louisiana. He had died in prison, and his estate was so desperately insolvent, that no administration was asked to it until after the institution of this suit. His means, and the public money by his misapplication of it, had been dissipated in land speculations through fifty counties, in every stage of title, from warrant and survey returned, to surveys unreturned and warrants unsurveyed. The whole was liable to be swept away by sales for taxes, before successive executions, according to the course of the courts, could have gone through a tenth of the counties. The title was moreover so involved, that a sale by the sheriff in the ordinary way would not have raised the costs. Individuals and associations also, by such devices as shipwreck commonly brings into action, endeavoured to conceal for their own use, a portion of the pro-

perty that had been cast upon the strand, without regard to the legal claims of any one. The only hope of salvage consequently rested upon just such an interference as was authorized by these acts. Whether it was constitutional is the question.

The characteristics of both the acts, are essentially the same. They are, First, to raise the money without sale, by compromise and transfer of the state lien. Secondly, to prepare the way for beneficial sale by investigating title, demanding, and by due course of law recovering, John Nicholson's papers from those who had no right to them, making partition in case of joint interest, and by staying sales for taxes. Thirdly, to sell under a warrant or writ by the governor, in the most beneficial way, upon credit, so much of the land as would raise the proportion of the lien debt averaged upon the particular tract sold, after a longer public notice of sale than the general execution law required, and in certain cases where the tract would not raise its proportion of the debt, to authorize a purchase by the commissioners for the commonwealth. The proceedings of the commissioners were to be under the sanction of an oath, and they received their compensation from the state, and not from the property of the debtor. In a word, the acts create a special authority to sell in satisfaction of liens for state debts, duly established according to law, with the fullest opportunity of trial by jury upon appeal from the settlement, and in regard to the judgment, with a jury sworn at the bar to try the issue, when the defendant confessed the damages. His estate was liable by the general law to make this satisfaction. The acts leave him and his representatives the unimpaired right to contest the liens in any and every way in the courts of justice; and they have done it in this case without stint, and without receiving any answer except upon the merits of their allegations. If there was no lien, the defendants have no title. If the debt was paid or released, the purchaser is not protected by these acts, as a purchaser at sheriff's sale would be under an execution upon a satisfied judgment. The debtor's remedy for any wrong done to him in the execution of the acts, is larger than if the sale had been made under the process of a court. It continues open for an unlimited time, may be set up collaterally in the investigation of any title con-

veyed under it, and has the benefit of a strict construction of the special authority conferred by the acts.

The question gravely is, whether the legislative power of Pennsylvania is competent to the creation of such an authority, or whether it is restrained by what is termed organic law from creating a power of sale, to be exercised by any thing but a court of justice.

Such a position as the last denies to the legislature of Pennsylvania the least and humblest of legislative capacities. The practice of all the states under their respective constitutions is against the proposition. The whole subject of remedial process, and of remedial laws of every kind, is entirely within the competency of the legislature. The forms of writs, original and final, are varied at pleasure. Powers of sale to assist or enforce vested rights, are created by them every day, and in every way and manner that convenience requires, in commissioners to sell for taxes, in executors and administrators to sell for debts, in guardians, committees of lunatics, and trustees generally. The very power in question, to sell in satisfaction of a lien annexed to the settlement of a public account, is given by an act of congress, under no larger a charter than is possessed by the state of Pennsylvania. Act of 15th May 1820, sec. 2, 3 Story's United States Laws, 1791. The adjudications are numerous, that when it is not an existing power in the courts, the legislature may create it; and that when it is, they may delegate it to another body: that as all legislative powers appertain to sovereignty, the choice of means to enforce existing rights belongs, in the absence of express restraint by the constitution, entirely to the legislature, to select any they may deem appropriate. Stoddart v. Smith, 5 Binn. 355; Wilkinson v. Leland, 2 Peters, 627; Estep v. Hutchinson, 14 Serg. and Rawle, 435; Rice v. Parker, 16 Mass. 330; M'Cullough v. The State of Maryland, 4 Wheat. 316; Fisher v. Blight, 2 Cranch, 396.

The matter of inquiry is, whether there is a constitutional restraint, and where it is.

By the constitution of Pennsylvania, article 1, section 1, the whole legislative power of the commonwealth is vested in the general assembly. In the creation of tribunals for the exercise

even of judicial powers, the legislature are under no restraint. They may place it where they please, and in themselves if they see fit. "The judicial power of this commonwealth shall be vested in a supreme court, &c. &c., and in such other courts as the legislature may from time to time establish." Art. 5, sec. 1. The power of the legislature to grant chancery powers to existing courts, or to create chancery courts, is without limitation. Besides the equity powers granted by the constitution to the supreme court and courts of common pleas, to perpetuate testimony, &c., "the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary, and may, from time to time, enlarge or demand those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice." Art. 5, sec. 6. The legislature, consequently, are not bound, in the erection of tribunals of any description, to prescribe to them the course of the common law, or the course of law as distinguished from equity; nor are they bound to vest powers either ministerial or judicial in existing tribunals. The whole subject is open to the legislative body to do as it seems fit. What then may be extracted from the plaintiffs' argument as objections to the acts of 1806, 1807?

1. It is said to be the exercise of a judicial power by an extra-judicial tribunal. The answer is already given, that this, if true in fact, would not be an objection. If it be a judicial power, the tribunal to which it is granted is within the range of the legislative powers of the commonwealth, vested in the general assembly. If it is not a judicial power, the objection fails in fact. It is indeed not judicial, but ministerial and simply remedial of an existing right. The power to compromise and transfer the state lien, if the former be judicial in its character, was not exercised in the present case, and never can be objected to by the heirs of Nicholson, because they cannot be affected by its exercise. It concerns the commonwealth and the transferee only. Whether judicial or not, and whether the constitution of Pennsylvania be unusually large in the grant of legislative powers or not, the objection has no weight. Cooper v. Telfair, 4 Dall. 14; Wilkinson v. Leland. 2 Peters, 660; Jackson v. Griswold, 5 Johns. 142;

Rice v. Parker, 16 Mass. 330; Satterlee v. Mathewson, 2 Peters, 413.

2. It is said to be ex post facto by its retrospective effect. It is not ex post facto. Laws of that character have relation to crimes. Calder v. Bull, 3 Dall. 386, 396; Fletcher v. Peck, 6 Cran. 138; Commonw. v. Lewis, 6 Binn. 271. If retrospective, that is not sufficient, there must be something more. There is no clause in the constitution of the state of Pennsylvania or the United States, against retrospective laws. Such a clause would have struck the legislative power as with a palsy. As to remedies, all defects in existing cases would have been made incurable by it; and even as to rights, circumstantial defects might have been extensively fatal. Retrospective laws, enforcing vested rights, are among the most indispensable and beneficial acts of legislation. *Ubi leges cum justitia retrospicere possent*, the courts cannot avoid enforcing them. They have been repeatedly sanctioned, and their constitutional validity asserted. Calder v. Bull, 3 Dall. 386; Bomback v. Bomback, 11 Ser. and Raw. 191; Holder v. James, 11 Mass. 396; Foster v. Essex Bank, 16 Mass. 270; Mason v. Hale, 12 Wheat. 375; Tate v. Stoolfoots, 16 Ser. and Raw. 35; Underwood v. Lilly, 10 Ser. and Raw. 101; Satterlee v. Mathewson, 2 Peters, 413; Goshen v. Stonington, 4 Connect. Rep. 221; Mason v. Hale, 12 Wheat. 378; Sturgis v. Crowninshield, 4 Wheat. 200; Bank of Columbia v. Okely, 4 Wheat. 205; Young v. Bank of Alexandria, 4 Cran. 397; Wilkinson v. Leland, 2 Peters, 658. The retroaction of these acts, if any, was to authorize a special process of sale, which justice and the general law warranted, and to which the power of a general court of chancery would have been competent, without any act of the legislature. If the exercise of the authority devests any rights, it does so in favor of vested rights. A court of equity could have done the same thing. The objection then is that the powers of a court of equity, which the legislature may create or grant to the utmost extent, and to any tribunal whatever, they cannot grant in a partial degree to commissioners, nor exercise it themselves.

3. It is said to be a violation of the trial by jury. The

acts deny nothing, but the inquisition upon the writ of fieri facias which compels a plaintiff to take an extent, if the rents and profits are found sufficient to pay in seven years. In regard to wild lands, however, like the tracts in question, they do not deny it, any more than the act of 1705. An inquisition is not necessary in such a case. 2 Dall. 77; 1 Yeates, 427; 2 Binn. 91; 2 Yeates, 150, 454.

At the same time the power of the legislature over such inquests, as part of the process, or to assist the court in the assessment of damages, is perfect and complete. They may restrict it, or abolish it altogether. It forms no part of the trial by jury secured by the constitution, and can be repealed at pleasure.

"Trial by jury shall remain as heretofore." The constitution does not say that in all cases in which facts have been heretofore ascertained by a jury or inquest, they shall continue to be so, but that *trial* by jury shall remain. What is *trial* by jury? This language is taken from the English common law, known and used in the colonies before the revolution. It is not a loose and vague expression, but of definite signification. It was not intended to bind the legislature to the old modes of ascertaining collateral facts, or for the determination of matters concerning which there is no judicial controversy, but to secure a great and well known mode of trial for the determination of *an issue*. *Trial* is the examination of the matter in issue. It supposes a suit, criminal or civil, an issue formed, and the reference of this issue for decision to some tribunal. It is the probation of the matter in issue, before judgment, and upon which judgment is to depend. Trial by jury, therefore, as one of the modes of trial known to the common law, is the probation of a matter of fact in issue between parties in a depending suit before judgment; it is its probation before that body, sometimes twelve in number, and in some actions more, to whom, according to the course of the law, the decision of issues in fact belonged before the constitution, in proceedings according to the course of the common law. This is the *trial by jury*, the right to which is secured, and its great value is in the decision of issues in criminal causes. The clause has no reference to such a case as the present. The right of trial by jury, in its constitutional sense, Nicholson had, and did not choose to exercise or enjoy it.

4. It is said to impair the obligation of a contract by the state with John Nicholson, and several contracts have been imagined. First, the contract is supposed to be implied in the words of the act of 1785, that the settlement shall be a lien "in the same manner as if judgment had been given in favour of the commonwealth," namely, to be enforced in the same manner by process of execution from a court. The meaning of this clause of the act of 1785 may be, either that the lien shall be equally *extensive* over the state, or equally *conclusive* of the debt in favour of purchasers, or of the same character and *effect* as that of a judgment; but it cannot be what the plaintiff supposes, because the thing concerning which the identity is enacted is the *lien*, and not the mode of enforcing it. The nature of the lien of a judgment as a general and not a specific lien, was well known in Pennsylvania, and the object of the clause was to liken the lien of a settlement to that which was already known. The clause had no other object. Secondly, a contract is supposed to be implied by the confession of judgment, that it shall be enforced only by execution. There is no warrant for any such implication. The contract of a judgment, or the obligation of the contract, is by the debtor to pay it; there is no contract or obligation in the creditor to obtain payment only in one way. He may obtain it through execution, or scire facias, or debt, or foreign attachment, or by bill in equity, or in any other way that the law allows at its date, or may subsequently allow. This suggestion, that the process to enforce a judgment is obligatory upon the creditor, in manner and form as it exists at the entry of the judgment, mistakes the creditor's rights for duties, and the duties of the debtor for rights. Thirdly, a contract is supposed to be implied in the grant of the land by the state to Nicholson, that the state would not resume the grant, nor sell the land by any extra-judicial, public, or arbitrary means. The state has not resumed the grant. The title of Nicholson is now the title of the defendant, not passing through the state, but transferred directly in satisfaction of debt by the process of the law. The nature of that process, whether it should be the old or a new form, and whether enforced under the supervision of a court or of commissioners, is within the competency of the legislature to decide. Unless every grant of land by the commonwealth

is a contract for the perpetual continuance of all laws existing at its date, and for the introduction of no other, there is no weight in this objection. Contracts by the commonwealth, not to use the constitutional power belonging to it, are not to be implied in the rash and fanciful manner of these exceptions. They require the support of clear and plain expressions. Providence Bank v. Billings, 4 Peters, 563; Jackson v. Lamphire, 3 Peters, 289.

It is said that the acts of 1806 and 1807 are partial laws made by the state for its own benefit, by which it has decided the question of right in its own favour. This is a misapprehension. Every question of right was previously settled by an impartial tribunal. Nothing remained but the remedy. If the state cannot devise a new remedy for its own rights, neither can it for those of a private person. If the acts are bad because the state is a party, the public interests must remain without protection, since the state must always be, to the same extent as now, a party to the legislation that protects them. As to partial legislation generally, there can be no reason for making a remedy larger than the mischief, and the legislature are the exclusive judges of the extent of any mischief that requires legislative aid. Whether an act should comprehend one case or a thousand, depends solely on the pleasure of those, from whom alone the act is to proceed.

Finally, it is supposed that these acts violate those clauses of the Pennsylvania bill of rights which prohibit unreasonable seizures, and the taking of property without the judgment of peers, or the law of the land. The answer to these is that there is nothing seized or disposed of, but what the general immemorial law of the state has devoted to the payment of debts. The multiplicity of constitutional objections by which the plaintiffs' argument has been distinguished, is probably owing to the difficulty of finding any one that possesses strength enough to stand by itself.

The points of evidence may be briefly disposed of. The journals of the house exhibiting the paper No. 21, being a statement of debts due the commonwealth on the 1st January 1797; the report of the committee of ways and means of 24th March 1798; and the report of the same committee of 30th March 1799; being offered to prove that the accounts of the commonwealth

and John Nicholson were not then finally settled, were properly rejected, because, 1. They were none of them competent evidence of the fact. If the question be what the house has done, and if that fact be relevant, the journals are evidence, but not as to facts stated in any report, order or resolution. 1 Phil. on Ev. 305, 323; Kelly v. Jackson, 6 Peters, 630; Titus Oates's case, 4 State Trials, 30. The only exception is when the fact to be proved is an act of state, as the king's speech and answer. King v. Holt, 5 D. and E. 445. 2. Because the fact was not relevant. Suppose all the accounts not then finally settled, or suppose the judgment and settlements to have been for the same cause, the title of the defendant was still good because the debt and the lien remained, until satisfaction. Leger C. was not evidence of itself, because it was not a book of original entries; it was a mere index, and an imperfect one too. Had it been an original book, it was offered too late, namely after the defendants' evidence was closed. It was not introduced to rebut any thing, and when that is not the case, the admission of additional evidence by the plaintiff after the defendant has finished, is in the court's discretion. The refusal is not matter of exception. Conard v. Atlantic Ins. Co. 1 Peters, 451; Salmon v. Rance, 3 Ser. and Raw. 314; Frederick v. Gray, 10 Ser. and Raw. 182; Irish v. Smith, 8 Ser. and Raw. 573.

Mr Sergeant, on the same side, (also for the commonwealth of Pennsylvania) argued as follows:

The title of the defendants is this. They claim under a public sale, fairly made, on the 15th July 1807. The money was paid (eighty-six dollars and sixty-seven cents for four hundred and thirty-eight acres and sixty-two perches), and a deed duly made under authority of law the 18th March 1808. The sale and the deed were of lands within the commonwealth of Pennsylvania. They were made under two laws duly passed by the representatives of the freemen of Pennsylvania. The one of these laws is dated the 31st of March 1806, the other, the 19th of March 1807. The title of the first of these acts is "an act for the more speedy and effectual collection of certain debts due to this commonwealth." The second, is a supplement. Under this purchase, the title is regularly derived to the de-

fendants. They, and those under whom they claim, have been in possession, actual or constructive, ever since, that is for twenty-one years before suit, *without question.*

The title of the plaintiffs is as follows. They claim to be the heirs of John Nicholson, and nothing else. They stand in the place of John Nicholson, with his right, whatever it is, and no more. They are neither creditors nor purchasers, nor have they any equity to add to the title that was in him. It is now to be seen what this title is, which they rely upon to overturn the laws, possession, deed and all. They have a warrant of the 24th of March 1794, for four hundred acres. It was one of five hundred and thirteen warrants taken out by Mr Nicholson for two hundred and three thousand five hundred and sixty acres, at fifty shillings a hundred. On the 14th of June 1794, he paid into bank fourteen thousand two hundred and fifty-four dollars for the whole quantity, this tract included. With whose money it was that he paid, does not positively appear. But it is fully proved that at the very time, he owed to the commonwealth more than one hundred thousand dollars for money and securities abstracted from the funds committed to him as comptroller, in violation of his official trust. There can be no great merit in paying the commonwealth with her own money, or in making official misfeasance contribute to private aggrandisement. A survey was made in August 1794, and duly returned. No deed poll is produced from the warrantee. It is useless, however, to scrutinize the title in its inception. By agreement between the plaintiffs and defendants (to which the commonwealth was no party) this is admitted. The title of John Nicholson, then, is warrant and survey in 1794, and payment of exactly twenty-four dollars and sixty-seven cents.

This is the whole of the title. From 1794 to 1828, a period of thirty-four years, the history is a blank. No possession was taken. It is not pretended. No claim of ownership. It is out of the question. No contribution to the prosperity of the commonwealth. Not even a tax paid. In the mean time, what happens? By the common exertion and contribution of the state and her citizens, the public prosperity is promoted. *These lands* are cultivated, improved and settled, at a great expense of money and labour, giving them a value they had not before. Then, after thirty and more years, come the heirs to

take the lands and improvements. There is a time for all things. Being suffered to pass, there ought to be an end of claim.

Of all that has been done, and all that was doing, the heirs had notice. Whatever has been done, has been done by or under public laws. A public law is notice to every body.

But, it is said, they were in another state, and were under the disability of infancy. As to the first, the answer is very obvious. Their being in another state, makes no difference where the question is of lands in Pennsylvania. They are affected, wherever they may be, with notice of the legislation of Pennsylvania upon lands within her limits.

Infancy makes no difference, where it is a question about charges upon land. This is an ancient common law principle. 1 Inst. 380, b; 2 Inst. 703. An infant's land may be sold under mortgage. It may be sold to pay debts. It may be sold to pay taxes. He is bound to take notice of public laws, unless expressly saved. In equity, he is bound where he stands by and does not give notice of his rights. 9 Mod. 38; 2 Eq. Ab. 489; 1 Brown's Rep. 353. A case like this, would be a fraud upon every principle of equity.

But the allegation of infancy is not founded in fact. The record shows that the oldest of the children of John Nicholson was of age twenty-four years before the suit was brought, and the youngest living, fifteen years.

Claiming, as they do, in right of their ancestor, it is but fit to say, that their ancestor had no property. He died insolvent, and he died in jail. That could not have happened in Pennsylvania, unless there were strong imputation of misconduct. So desperate were his affairs, that no administration was taken out. He was overwhelmed with judgments, as the record will show, for which no satisfaction could be had, and which, as well as his other debts, still remain unsatisfied. All that ever was in his name would not now pay his debts. But these debts are in various ways affected by length of time. Some are barred by the statute of limitations. In many, the securities are lost, the parties dead, or other changes have happened to destroy their activity, and to open a chance of getting the property without paying the debts. What a revolution it

would be! We have heard of posthumous fame. This is a new mode of creating a *posthumous fortune.*

Suppose, for a moment, it were John Nicholson himself. Could he be listened to for a moment? The suggestion is too extravagant to be entertained. What property could his heirs derive from him? Looking at his history, as spread upon the record, it is not too much to say it is impossible he should have had any. It is an abuse of terms, in defiance of such evidence, to talk of property derived from him. Such suits seem to be speculations upon human memory and the preservation of papers and records. They must be founded upon the calculation, that after a length of time, many things will be forgotten or lost, and what is known to be true, cannot be proved. The boldness of the undertaking is without a parallel in judicial history. The plaintiffs attempt to overturn (as will be seen in the sequel) eight acts of the legislature of Pennsylvania; three settlements of public accounts, made almost forty years ago; two solemn decisions of the supreme court of Pennsylvania; a judgment of the same court, and a deed made by the commonwealth of Pennsylvania. All this, too, by a new light, arising after twenty-five years of darkness, and against bona fide purchasers without notice. This court is called upon to exert a power of destroying, far transcending all former precedent. Single laws, and single acts, have been questioned. But this suit proposes a sort of general nullification of all that has been done for a third of a century.

What is more particularly to be said, in answer to the claim set up by the plaintiff in error may be presented under these heads, which will comprehend all the errors assigned in the charge.

I. That the commonwealth of Pennsylvania had liens upon the lands of John Nicholson, for a debt or debts owing to her.

II. That the acts of 1806 and 1807 were constitutional acts; and the proceedings under them, valid and effectual to enforce those liens, and recover the debts.

I The commonwealth had three liens.

1. By the settlements of March and December 1796

2. By the judgments in the supreme court

3. By the fact that a debt was due to her from a person deceased, that is, John Nicholson; in other words, she acquired a lien by his death, if she had none before.

It is immaterial what was the nature of the lien, provided there was a lien. The essence is, that a debt was due. Against those claiming as heirs, *that*, of itself, was sufficient.

1. The commonwealth of Pennsylvania had a lien by the settlements of March and December 1796.

Before examining the acts, I will lay down some general principles, unquestionable in themselves, and applicable to the present case.

1. That in the management of her own fiscal concerns, Pennsylvania has the power of a sovereign and independent state.

2. That she has a right to make laws for the collection of her revenue, and for the settlement of accounts of public debtors and creditors. It is necessary for creditors, as well as for debtors, because the state is not suable, and they can only obtain payment by means of such laws.

3. That she has a right, for this purpose, to constitute such tribunals, and establish such modes of proceeding as she may think proper. That peculiar laws and peculiar proceedings are indispensable, and universally adopted, because the administration of the revenue of a state cannot be adequately managed, nor with the necessary dispatch, by the agency of the ordinary tribunals or the ordinary forms. And that this is not at all in derogation of the common law, which cannot properly be said to apply to it. It is done by the United States, and by every state in the union.

4. That she has a right from time to time to alter these laws and proceedings, according to her own view of her own exigences, as fully as the United States or any other state.

5. That persons accountable to the commonwealth, have no vested right in the particular provisions of accounting laws, which can interfere with this power of the state. The act of congress of the 15th of May 1820, is retrospective, as well as prospective, in its operation. The question mooted in 4 Wheat. 4, as to the right of reducing salary, has no bearing upon the present.

6. That the acts and proceedings of these special tribunals

need not be according to the course of the common law, but must be according to the exigences of the state. Such has been the practice from the earliest period of the commonwealth, allowing finally, on appeal or otherwise, a trial by jury, since 1785.

7. That the proceedings of such tribunals, however constituted, are entitled to respect; they are not to be collaterally questioned; and after a length of time, every thing is to be presumed in their favour, as in favour of any other tribunal. Thompson v. Toulmin, 2 Peters, 157.

8. That where acts are done by accounting officers, according to law, they will produce their legal effect, without any regard to the intentions of the officers themselves.

9. That where the power of the commonwealth over this subject is exercised in part, the residue is not parted with or destroyed, but reserved in full force, to be executed in such mode as the legislature may think fit. In other words, the subsisting laws are not a contract with the office or accountant, but are liable to be altered at the will of the legislature. Providence Bank v. Billings, 4 Peters, 514, 559, 560, &c.

This was the understanding and practice of the state before the constitution; it has been so since; it is so with the United States, and every state in the union. In relation to public dues, it must be so.

With the benefit of these principles, then, let us proceed to the first inquiry, which may be examined under two heads.

1st. Were the settlements of March and December 1796, settlements according to law?

2d. If they were, did they constitute a lien?

1. They profess to be settlements, and are made by the authorized and proper officers, using their official titles in the act. They are made in the usual office forms, and deposited in the proper office, where they have since remained, and whence they were brought to be given in evidence in this cause They are duly certified, and were produced by the plaintiffs. They embrace subjects proper for settlement, and within the jurisdiction of the officers who made the settlements. They were made by officers, who had nothing to do with the accounts but to settle them. They were made thirty years ago. From that time to this, no further or other settlement has ever been made

of these accounts. They have never been called in question but once—that was by a creditor, a single objection was made, and was authoritatively decided in their favour. So far as to the accounts themselves; enough, certainly. But the evidence does not stop here. There is a mass of proof, besides, in the record, of irresistible force and weight.

They were recognized and sanctioned, as settlements, by John Nicholson himself. The two accounts of the 19th of November 1796, proved to have been in his possession, one by his own indorsement, and the other by indorsement of his counsel, refer to them as settled accounts. These papers, it will be observed, are not themselves settled accounts. They were then in course of settlement, which was completed in the following month, by giving him credits against the balance of the former settlements. The first item in each is a debit for the balance of the account previously "settled." It is material to remark that they come from amongst the private papers of Mr Nicholson. They were there for more than three years during his life, without disapprobation or objection. This is conclusive evidence of assent to what is contained in them. It would be so at any time. Still more is it so, after so great a lapse of years. It would be conclusive evidence against any one. A fortiori, is it conclusive against Mr Nicholson, who had been so long comptroller, and was acquainted with the forms of office. He knew the precise import of the word "settled." One of them was received by him in 1796, the other at least as early as the 21st of March 1797. This fact thus becomes an admission by John Nicholson himself that there had been a settlement according to law.

Again, if the argument on the other side be correct, these settlements were adopted, acted upon, and finally and conclusively agreed to, by the judgment in the supreme court in March 1797. The argument is that the judgment was for the amount of these settlements. If so, it was upon the settlements, and affirmed them.

Further, in the year 1803, one of these settlements was submitted to judicial investigation and decision in the supreme court of Pennsylvania. Smith v. Nicholson, 4 Yeates, 6. It was decided upon. That decision has been the uncontroverted law of Pennsylvania for twenty-seven years. It has been the

foundation of repeated legislation by public laws, as a reference to the several acts of assembly upon this subject will show. The judiciary was first appealed to, and when the rights of the commonwealth had been judicially ascertained, and not before, laws were made to render those rights effectual. The course pursued was the opposite of that which has been imputed. The legislature did not exercise its power upon the question of right. There was no arbitrary assumption or exertion of authority, no interference with the exercise of judicial power, no invasion of the province of the judiciary, nothing which bears the most remote resemblance to seizure or confiscation of property. But when the courts had decided that the property was liable for the debts due to the commonwealth, that the settlements were a lien, then, and not till then, the legislature interposed, (as it was rightfully bound to do) to devise the means of rendering the right effectual, to afford the needful remedy, to enforce the payment of a just debt out of the fund that was adjudged to be liable for it.

The first act of the legislature upon the subject, is that already referred to, of the 4th of April 1805, entitled, "An act for the more speedy and effectual recovery of debts, &c." It authorizes the sale of all the commonwealth's liens to Blythe and Nicholson, and directs the payment out of the moneys of the commonwealth of the taxes on the "lands of the late John Nicholson." The act of the 4th of April 1805 appropriates ten thousand dollars for the payment of the taxes. The act of 31st of March 1806 (one of those now in question) prohibits sales for taxes, and authorizes their payment out of the state treasury. The act of 19th of March 1807 asserts the lien. The act of 24th of March 1808 is a supplement to the act last mentioned, to give certain powers to those who purchase portions of the lien by way of compromise. The act of 28th of March 1814 is also a supplement, and prohibits sales for taxes. The act of 16th of March 1810 authorizes payment of taxes. And the act of 5th of February 1821 authorizes the issuing of process for the sale of land, in behalf of individuals named in it.

Here, then, are eight public laws of the commonwealth, extending through a period of sixteen years, all assuming the existence of the settlement and lien, and providing for the protection and security of the property, as the fund for the payment

of the debt. Public laws were suspended in their operation upon these lands. The taxes were paid out of the public treasury. Sales were made, purchases, compromises, and releases. There has been an universal acquiescence, especially by the numerous creditors of John Nicholson. But for this, the lands would long ago have been sold for debts or for taxes. It has been truly said, that it is owing to the interposition of the commonwealth alone, that there is any thing now to dispute about or claim.

This public fact has become extensively incorporated into land titles throughout Pennsylvania. Improvements have been made upon the faith of it. Transfers of property have assumed it, to an extent not to be defined, but, according to a printed paper put forth on the part of the plaintiffs, embracing more than two millions of acres.

Is it competent to the plaintiffs at this time of day to dispute the settlement? Can they be permitted, by such exceptions as are here presented to what was so long ago done, to disturb the titles thus derived under the laws of Pennsylvania? If there were not a paper or a witness, is there not ample evidence? Can they, who have lain by, now demand proof of what was done thirty-four years ago? To allow it, would encourage frauds, would destroy the security of property, and the peace of society. These are considerations of weight, and are estimated accordingly in the administration of justice. Chalmer v. Bradley, 1 Jac. and Walk. 63. More than time has now run to make a bar by statute. A mortgage would be barred in less time. A bond would be presumed paid. Almost any thing would be presumed in support of a right. The presumption comes in the place of evidence which time has effaced or destroyed, and to uphold that which has become so settled as to give assurance of itself, that it was originally fixed upon a sure foundation.

But what are the objections to the settlements? Can they not be refuted, even without aid from the principles which have been adverted to? It is impossible to avoid remarking of them, that they are altogether unworthy to be associated with the great points professed to be aimed at in this case. They tend to degrade their companions, and bring them into suspicion. What are they?

1. That there was no notice given of the settlements to John Nicholson.

The meaning of this objection must be that there is no *proof* of notice. It may be answered then, in the first place, that after such a length of time, it is not necessary. It will be presumed. In the next place, the settlement itself is sufficient. Either notice was required by the laws of Pennsylvania, or it was not. If it was not, there is an end of the matter. If it was, the presumption would be that the accounting officers did what the law required of them, at least until the contrary appeared. In the Commonwealth v. Fitler, 12 Serg. and Rawle, 277, (which was under a different law) the negative was proved. *That*, therefore, affords no rule in the present case. The whole accounting system of Pennsylvania is founded upon the act of 1782. That act contemplates settlement upon accounts produced by the accountant. 2 Dall. Laws, 45. He is, therefore, the actor, in general, and requires no notice.

But there is clear proof of notice in fact. The two papers before referred to, of November 1796, state the settlements to have been made, and no objection was ever taken to them, though John Nicholson lived for several years afterwards, and lived in the same city where the government was, and where the accounts were settled. It is quite incredible that he had not notice.

In addition to all this, the settlements were made under a public law of April 20, 1795, 3 Dall. Laws, 1790, specially directing the settlement of the accounts of John Nicholson. A public law is notice to every body.

It is sufficient, however, for the present case, that no law required notice to be given.

2. That these settlements were not "entered" in the books of the accounting officers, as it is alleged was required by law. The meaning of this, as of the former objection, is that there was no *proof* of the entry.

The first answer is, that there *was* proof. The plaintiffs themselves produced the settlements, and made them their own evidence, though they would have come in more properly on the part of the defendants. Both of them were accompanied by official certificates, by the proper officers, also given in evidence by the plaintiffs, that they were "settled and *entered*."

Can they deny this, without any proof to the contrary? The fact is, they were entered.

The next answer is equally decisive. The entry in the books is no part of the settlement. It is *of* the settlement, and *after* the settlement. The settlement is completed, and after being completed, is then entered, as having been made. Act of 4th April 1792, 3 Dall. Laws, 218. In case of appeal, the entry would not be till after the appeal. Was there no settlement in the mean time? Then, there could be no appeal, for the appeal is from the settlement. The settlement is final before appeal, but its enforcement is suspended by the appeal. The entry could not be made till the officers were ready to certify to the governor.

3. It is objected, that these are not settlements of all the accounts of John Nicholson, and the officers were not authorized to settle in part. This objection is without any foundation in fact, for the books which it is supposed would prove it, are not in evidence.

But le. it be admitted, as it is probable that there were other accounts. It may perhaps be inferred that there were, from the various duties devolved upon him by different laws, and from the repeated appropriations for the expenses of investigating his accounts. Is the legal inference correct? Certainly not. There is no law which requires that a settlement should be of all accounts. On the contrary, the act of 20th of April 1795, 3 Dall. Laws, 790, directs them to be settled from time to time, in succession. This point also must be considered as having been decided in Smith v. Nicholson. In truth, the subjects of account were distinct and separate.

4. It may be suggested, that upon a general settlement, the balance might have been in his favour, though upon these accounts, it was against him. But to this suggestion, of a mere possibility, there are several decisive answers. First, the nature and duties of his trusts were such as to make it impossible there should be a balance in his favour. He could not be in advance, the accounts arising from property entrusted to him. Secondly, all the efforts to obtain a settlement, were on the part of the commonwealth. No aid was given by the accountant. What was obtained, was extorted from him. Finally, the confession of judgment is an unequivocal admission. The whole

inquiry, however, it will be seen, is immaterial to the present purpose. It is stated only to show that there is not the slightest ground for the suggestion of even the possibility of injustice on the part of the commonwealth towards Mr Nicholson.

5. It has been intimated that the officers did not intend them to be settlements. Where such a notion could have been derived, it is difficult to conceive. For reasons already stated, it would be immaterial what they intended, if they officially did what produced a certain legal consequence. But the fact that they did intend them to be settlements, is apparent; for the act of 20th April 1795, made it their duty to *settle*. Again, they have always been treated as settlements, by every department of the government: and, in addition, they were acknowledged by Mr Nicholson himself to be such, as has already been shown.

There are some other objections made. It is unnecessary to go through them in detail, as they have already been sufficiently answered.

2d. Did these settlements constitute a lien, and what was the nature of the lien?

It can scarcely be necessary to consider this question upon original grounds, having been long ago decided by the supreme court of Pennsylvania. A short view, however, will suffice to show how well grounded that decision was. It may be premised, that the accounting laws of Pennsylvania are not in derogation of the common law, or of the usual course of proceeding. Neither can it be said that they establish new powers, for the benefit of the party creating them, and direct their execution in an unusual manner. They are not, therefore, obnoxious to a construction of such strictness as has been suggested. They are not at all within the reason of Schip v. Miller's Heirs, 2 Wheat. 325, as laws giving powers of forfeiture. They are remedial, not penal. They are laws for the settlement of public accounts, and for the payment of public creditors, as well as the collection of public dues. They are salutary and necessary. They are entitled to a fair construction.

These laws are all to be considered, in the construction of any one of them. The act of 4th April 1792, sect. 1, 3 Dall. Laws, 222, contains a special repeal of so much of every former

act as is thereby altered or supplied, and no more. Thus, the whole of the acts of assembly, from the 13th April 1782 to 4th April 1792, form one system, and are to be construed together. It may be said, then, in the first place, that the lien of the act of 1785 is no where expressly taken away. Neither is it any where expressly "altered or supplied." Is it done by implication? Assuredly not, as a moment's attention will discover. By the act of 1782, the comptroller's settlement was made conclusive, and summary process was authorized to be issued immediately against the property and person of the debtor, not unlike that given by the law of the United States of the 15th May 1820, 2 Dall. Laws, 44. The act of 1785, 2 Dall. Laws, 247, was to give the benefit of trial by jury. For that purpose the third section gave an appeal. The appeal, of course, suspended the issuing of process to enforce the settlement. In lieu of it, and to secure to the commonwealth the recovery of what might finally appear to be due, the twelfth section gave the *lien*. The appeal and the lien, therefore, came into existence together, and the one was given precisely because the other was given. The natural conclusion would be, that they would continue together, the reason being the same for keeping them associated, as for originally associating them. The appeal continued throughout; therefore, the lien continued throughout. Such must have been the intention of the legislature. It cannot, with any propriety, be said to be oppressive or unjust. On the contrary, it is part of a system for the relief of the accountant, which, but for the lien, would not be consistent with a due regard for the security of the commonwealth.

The only argument against the lien is founded upon that part of the twelfth section which speaks of the executive council. The answer to it is an obvious one. By the third section, the approbation of the executive council was necessary to make a settlement. The powers of the executive council were transferred to the governor, and the concurrence or approbation of the governor ceased to be necessary after the act of the 21st September 1791, 3 Dall. Laws, 113, except where there was a disagreement between the comptroller and the register, in which case the governor was to decide between them. If they agreed, their settlement was effectual. To suppose that the governor's interposition had any effect upon

the question of lien, would lead to this absurdity, that where the accounting officers differed, the settlement would be a lien; where they agreed, it would not.

But why should this question be argued? It has been judicially decided by the supreme court of Pennsylvania twenty-seven years ago, and is the settled law of the state. Smith v. Nicholson, 4 Yeates, 6; United States v. Nichols, 4 Yeates, 251. Such a decision, upon acts of assembly of a state, in the state courts of the highest authority, has been repeatedly adjudged here to be conclusive evidence of the law of the state. Hinde v. Lessee of Vattier, 5 Peters, 393; Ross v. M'Lung, 6 Peters, 283; 1 Conn. Rep. 159, in notes. It has been said that the supreme court of Pennsylvania would not, themselves, be bound by their own decision, and to prove it, we are told that in Bevan v. Taylor, 7 Serg. and Rawle, 397, (a case turning upon the construction of the intestate laws) they overruled Walker's Administrators v. Smith, 3 Yeates, 480. But admitting this to be so, it is only necessary to say, that Smith v. Nicholson never has been overruled or questioned. It is the law of Pennsylvania now, whatever possibilities there may be as to the future. If it should hereafter be overruled, it will then cease to be authority, but not before. This, however, is not likely to happen. It is too deeply rooted to be overturned without extensive mischief, an argument admitted by the supreme court of Pennsylvania to be of great weight in favour of supporting ancient decisions. 7 Serg. and Rawle, 400.

The nature of the lien is sufficiently explained by the words of the act of assembly. It extends to all the lands of the debtor throughout the commonwealth.

2. The second lien of the state was under the judgment of the 21st March 1797 in the supreme court of Pennsylvania, for one hundred and ten thousand dollars. This, like the lien by settlement, bound all the lands of Mr Nicholson throughout the commonwealth. Such is conceded to have been the effect of judgments obtained in the supreme court of Pennsylvania before the passing of the act of 1799.

3. By the death of John Nicholson, the state had a lien, and still continues to have a lien, as a creditor, upon all his lands in Pennsylvania. The lands of a decedent are bound for his debts. Graff v. Smith, 1 Dall. 481; Morris v. Smith, 1 Yeates,

238, 4 Dall. 119. In favour of purchasers, this lien is limited to seven years. Against heirs, it is without limitation.

It appears thus, upon reviewing the case,

1. That there was a debt, conclusively and finally ascertained to be due to the commonwealth.

2. That this debt was a lien upon the land.

3. That it was of the nature of that lien, to give a right to raise the money out of the land by sale.

4. That there was no process to effectuate this right.

Could the legislature provide the remedy? That is really the only question that remains. The points above stated being all settled, was it or was it not competent to the legislature to devise the means of doing what every one must agree ought to be done? This brings us to the second general head of inquiry.

II. Are the acts of 1806 and 1807 unconstitutional and void?

As has been already seen, they are strictly and bona fide remedial acts, to enforce the payment of debts justly due, out of a fund admitted to be liable for their satisfaction. They had no other object or intention. They were to supply a defect of suitable process, so that the creditor might have justice done him, and that against a public accountant, whose debt was evidence of official delinquency. They have worked no injury to any one. The heir had nothing until the debts were paid. Wilkinson v. Leland, 2 Peters, 629. The property was insufficient to pay even the debt due to the commonwealth, as a fair public sale has ascertained. There was nothing for the heir. Was the legislature incompetent to supply the process? Those who affirm a proposition so extravagant, ought to make it out very clearly. A constitution imposing a restriction so unreasonable, would require to be altered. It is against every notion of what is expedient and what is just. The right of a creditor is a perfect right; it is as strong as the right of property, and has as strong a claim to protection. To take away all remedies from the creditor would be unconstitutional. To withhold from him adequate remedies, is contrary to the spirit of our social compacts. How, then, can it be unconstitutional to give him an adequate remedy? There is a glaring contradiction in the hypothesis. Common sense is confounded by it.

The purpose being a lawful one, the legislature really and truly adopted the means which they thought necessary for its attainment. They did not confiscate the lands; they did not seize upon them: they simply devised a mode of selling them, so that out of the proceeds, the debt owing to the commonwealth might be paid. The objection, then (if any there be), is only to the mode. This is a very narrow ground indeed. It is, that the legislature, in the exercise of a discretion which belongs to them, did not select the mode which to others may seem most fit. This is neither more nor less than to deny to them all discretion in the use of means; to limit them, where their power is usually deemed to be the most unlimited. There is no doubt whatever, that the method of proceeding they adopted, was in fact the best. But that is a discussion not to be entertained in a judicial investigation.

Before proceeding to examine the particular objections which have been made to these laws, it is necessary to establish the test they are to be submitted to, by referring to certain well settled principles of constitutional law.

1. It may be stated, upon clear authority, that a question of conflict between a law of a state and the constitution of the state, is not a question of federal cognizance. The judiciary of the union has a clear paramount authority in all cases where there is a question whether a state law is repugnant to the constitution of the United States. Satterlee v. Mathewson, 2 Peters, 380; Jackson v. Lamphire, 3 Peters, 280. But a question between a state law and a state constitution, comes into this court only in its administration of the laws of the state. It will be guided, therefore, by state decisions; giving the law to the state tribunals in questions of federal cognizance, and receiving it from them in questions properly of state cognizance. Judicial harmony is thus preserved.

2. That the constitution having received a construction by legislative, executive and judicial action, and the acquiescence of the citizens for a long time, that construction will prevail in judgment, especially if rights be founded upon it. Stuart v. Laird, 1 Cranch, 292; M'Cullough v. State of Maryland, 4 Wheat. 316.

3. That there must necessarily be a limit in time to the

right of individuals to question the constitutionality of a law, where, by so doing, they would injure others who have acted upon a received construction, or overturn what has been done.

4. That it is incumbent upon those who would thus impeach a law, plainly to show a plain violation of some express provision of the constitution, so that laying the constitution and the law side by side, there is a manifest incompatibility.

"It is a power of high responsibility, and not to be exercised *but in cases free from doubt.*" Tilghman, C. J. 3 Serg. and Rawle, 73.

"The question whether a law be void for its repugnancy to the constitution, is a question which ought seldom, if ever, to be decided affirmatively in a doubtful case. The opposition between the constitution and the law should be such, that the judge feels a clear and and strong conviction of their incompatibility with each other." Marshall, C. J. 6 Cranch, 128. "Must plainly violate some express provision of the constitution." Washington, J. 2 Peters, 330. And as to all speculative objections, founded upon supposed general principles, they are entirely put aside by Chase, J. in 4 Dall. 18. General principles in the constitution are not to be regarded as rules to fetter and control, but only as declaratory or directory.

5. That where a power is given by the constitution, the choice of means for effectuating it belongs to the legislature. United States v. Fisher, 2 Cranch, 358; M'Cullough v. State of Maryland, 4 Wheat. 316.

6. That an act may be constitutional in some of its provisions and unconstitutional in others, and the latter will not hurt the former.

7. That it may be unconstitutional against one person, and not against another, and the latter cannot avail himself of the privilege of the former. If the acts in question were objectionable against creditors, (as they certainly are not) they might be good against the heirs.

It will be perceived, at once, how these principles meet and obviate every objection that has been made. Before proceeding to examine these objections in detail, try them by another very simple test. Is there any thing in the constitution of the United States, or of the state of Pennsylvania, which says that a man's

property shall not be sold for the payment of his just debts? Is there any thing which says the legislature shall not be allowed to judge of the means? Leland v. Wilkinson, 2 Peters, 656, 657, &c. is exactly to the contrary, and is to the very point of the present case.

It is no objection, founded in the constitution, that laws are retrospective. The constitution itself is decisive of this. The express prohibition of ex post facto laws, meaning retrospective *criminal* laws, is an admission that retrospective *civil* laws may be made. Expressio unius exclusio est alterius. No well digested constitution could contain such a prohibition. It may be conceded, that in general they are against the principles of sound legislation. But occasions will sometimes occur where they are necessary. These cases make exceptions. That retrospective laws are not, on that account, unconstitutional, has been repeatedly decided in Pennsylvania. Barnbaugh v. Barnbaugh, 11 Serg. and Rawle, 191; Underwood v. Lilly, 10 Serg. and Rawle, 97; Barnet v. Barnet, 15 Serg. and Rawle, 72; and was decided in this court in Satterlee v. Mathewson, before referred to. But the laws now in question are in no sense retrospective. They are entirely prospective.

Neither is it any objection that laws may seem to exercise judicial functions. Estep v. Hutchinson, 14 Serg. and Rawle, 435. The line is not so defined as to mark exactly in all cases the boundary between legislation and judgment.

Nor is it any objection that they constitute new tribunals. The legislature have power to do so by the constitution of Pennsylvania. Article 5, sect. 1.

Objections are not to be listened to, which have no better foundation than a general charge of injustice, or an appeal to what is supposed to be a sort of prevailing complexion of the constitution. These are arguments to be addressed to the legislature, when they are enacting laws, perhaps to the judiciary when expounding them, but never when called upon to declare such laws to be incompatible with the constitution. If ever admissible, however, they would be inapplicable in the present case, where nothing has been done but what is just in itself, and in conformity with the soundest principles of legislation.

The specific constitutional objections made by the plaintiffs

in error, are sufficiently numerous. But their weight is in no proportion to their number. They are only so many cyphers.

1. It is said to be an infraction of section 10, article 1, of the constitution of the United States, and section 17 of the bill of rights of Pennsylvania. The one prohibits the making of state laws impairing "the obligation of contracts," the other prohibits laws "impairing contracts." They are in substance the same.

A contract will not be implied, in order to render a law obnoxious to the constitutional prohibitions. Hart v. Lamphire, 380.

But here there is no contract, express or implied.

The grant of the land, by warrant and survey, was no contract that it should not be liable for the debts of the owner. It was exactly the reverse. The grant made him the owner, with the power to aliene, and subject to alienation by process of law. It was to him, his heirs and assigns. Land is liable for the debts of the owner, is bound by judgments, and may be sold for the payment of his creditors. This is an incident to ownership, not repugnant to it, but one of its legal consequences. There is no resumption of the grant, as in Fletcher v. Peck, but a confirmation of it. All this is fully and clearly explained in Satterlee v. Mathewson, 2 Peters.

The *settlement* is no contract, nor the lien arising from it. The latter is to operate "in the same manner as a judgment," that is, to bind in the same manner. It is *in invitum*, obtained by compulsion of law, and not deriving any of its efficacy from the agreement of the party. The means of enforcing it, too, are derived from the law, and may be varied by the legislative power. They are not limited to such as may be in use when the judgment is obtained.

There was no restriction in the special entry of the judgment, except that which was expressed, namely, that Mr Nicholson should have a limited time to point out errors. The time being expired, without error being alleged, the judgment stands for the whole amount for which it was confessed.

These laws not only violate no contract—they are in execution of a contract. All public dues bind by contract. There is an implied assumpsit. The claim upon Mr Nicholson was still stronger, being founded upon his official contract, as well

as upon the contract arising from his applying the money and property of the commonwealth to his own use.

2. There can be no necessity for saying more in reply to the second objection, than that the eighth section of the bill of rights of Pennsylvania, relates only to seizure and search, and here, there was neither seizure nor search. Both these words have an appropriate legal sense, well understood.

3. It is said to violate the seventh article of the amendments to the constitution of the United States, and the sixth article of the bill of rights of Pennsylvania.

If this amendment of the constitution of the United States were applicable to the states, (as it is not) it would still be impossible to understand how the present case could be brought within its words or meaning. It was no "trial at common law." The execution of a judgment was what was in question.

The sixth article of the bill of rights of Pennsylvania says nothing more than this: "trial by jury shall be as heretofore, and the right remain inviolate." Was it ever the practice to have trials after judgment? Were juries ever used in such cases before? An inquest to ascertain whether the rents and profits will pay in seven years, is not a jury in the sense of this article. It owes its existence to an act of assembly which the legislature may at any time repeal or alter: and, in addition, it never was necessary in a case like this, of vacant and unseated land, (as the land in question was at the time of the sale) but only where lands are improved and yielded an income.

4. It is said to contravene the fourth article of the bill of rights. The answer is manifest. That article applies only to criminal prosecutions. If otherwise, it has been literally complied with.

Neither can it be said with any propriety, that this property was taken for public use without compensation. It was not taken at all, but sold for the payment of debts. There was no exercise of the right of eminent domain.

There is want of precision in the argument which imputes to these acts as an objection, that they were made by the legislature in its own case. The debt was owing to the commonwealth. The commonwealth was the creditor, the entire body politic, made up of all the citizens of Pennsylvania. The legislature was only a branch of the government. That the legislation was about matters which concerned the commonwealth,

can surely be no valid objection, for these are peculiarly the proper subjects of legislation. The members of the legislature are no more interested than any other citizen.

In every aspect, therefore, in which the case can be reviewed, it appears that the proceedings of the commonwealth of Pennsylvania have been just, prudent, patient, and intelligent, as well as entirely consistent with the constitutions of the union and the state. The government in all its branches has done its duty, and has done no more. The proceedings have been right in form and in substance. To have established this, is all that can be necessary to vindicate the commonwealth against every charge that has been made, and renders it superfluous to notice the terms in which they have been so repeatedly presented. They perish of themselves, when they are thus shown to be without foundation. The respect due to the source from which they proceed, cannot sustain them now, whatever claim to attention it may have given them in the first instance, before they were examined. With them also fall the exceptions to the judgment of the court below upon the points here discussed, all of which have been embraced in the discussion.

The exceptions to the opinion of the court below, upon questions of evidence, now assigned for error, have been fully considered.

Mr Justice JOHNSON delivered the opinion of the Court.

This case comes up by writ of error from the circuit court of the United States of Pennsylvania, in which the plaintiffs here, were plaintiffs there. The plaintiffs make title as heirs of John Nicholson, and the defendants as purchasers under certain commissioners, constituted by a law of that state for the purpose of selling the landed estate of John Nicholson; in satisfaction of certain liens which the state asserted to hold on his lands. The plaintiffs controvert the validity of that sale:

1st. As violating the constitution of Pennsylvania.

2d. As violating the constitution of the United States.

3d. As inconsistent with the principles of private rights and natural justice, and therefore void; though not to be brought within the description of a violation of any constitutional stipulation.

1. To maintain the argument upon which the counsel for plaintiffs rely, to establish the unconstitutional character of the acts under which the sale was made to defendants; the plaintiffs' counsel commenced with an effort to remove out of his way the liens, to satisfy which the legislature professes to pass the acts authorizing the same.

It appears from the record that at the time of passing the acts which constituted this board of commissioners, to wit in 1806 and 1807, the state claimed to hold four liens upon the lands of John Nicholson.

1st. A judgment for special damages, amounting to four thousand two hundred and eight pounds eight shillings, entered December 18th, 1795.

2d. A settled account of March 3d, 1796, for fifty-eight thousand four hundred and twenty-nine dollars twenty-four cents, afterwards reduced to fifty-one thousand two hundred and nine dollars twenty-two cents.

3d. Another settled account of December 20th, 1796, for sixty-three thousand seven hundred and twenty-seven dollars eighty-six cents. And

4th. A judgment confessed and entered March 21st, 1797, for one hundred and ten thousand three hundred and ninety dollars, with certain special matter attached to the confession, wholly immaterial to the present controversy. The evidence of dates and circumstances might seem to lead to the opinion, that the first judgment or the consideration of it was incorporated into the settlements, and that the judgment of 1797 covered the whole. But, of this there is no sufficient evidence; and the several liens must, on the facts in proof, be considered as they are exhibited on the record, as substantive and independent.

By a law of Pennsylvania of February 15th, 1785, settlements made by the comptroller, with certain prescribed formalities, are declared to be liens upon the real estate of the debtor, "in the same manner as if judgment had been given in favour of the commonwealth against such person for such debt in the supreme court." A right of appeal is given if the debtor is dissatisfied, with injunctions that the court shall give interest for the delay, if the appeal is not sustained; but, unless such appeal is made and judgment against the debtor, there is no

provision in the law for enforcing satisfaction of the lien by sale or otherwise. It is made to be a dead weight upon the hands of both debtor and creditor, without the means of relieving the one or raising satisfaction for the other.

A great proportion of the argument for plaintiffs, both here and below, was devoted to the effort to prove that the two settlements enumerated were not subsisting liens at the time of passing the two acts of 1806 and 1807, under which the sale was made to the defendants. But, from this, as a subject of adjudication, we feel relieved by the two decisions cited from the fourth volume of Yeates's Reports: since it appears that this very lien of the 3d of March 1796, has been sustained by a decision of the highest tribunal in that state, as long ago as 1803 (Smith and Nicholson); and that again in 1805, this decision was considered, and confirmed, and acted upon, in another case in which the several applications of the principles established in the first case came under consideration. United States v. Nichols.

Now the relation in which our circuit courts stand to the states in which they respectively sit and act, is precisely that of their own courts: especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them, or deviate from them, than could be correctly exercised by their own tribunals.

It is proper here to notice a relaxation of this principle, into which the court below seems to have been surprised; and in which the argument of counsel in this cause, was calculated to induce this court to acquiesce. In the case first decided in the supreme court of Pennsylvania, to wit that of Smith and Nicholson, 4 Yeates, 8, most of the arguments made use of in this cause to get rid of the lien of the settlement, and particularly that of a repeal of the act of 1785, or a want of compliance with its requisitions, were pressed upon that court, and carefully examined and disposed of by the judges. But there have been a variety of other grounds taken in the court below in this cause, and again submitted to this court in argument, which do not appear from the report of that decision to have been brought to the notice of the state court. Such were

the want of notice of the settlement; the want of its being entered in the books of the accounting officer; the balance not being struck in dollars and cents; that the order of settlement was reversed, and as the plaintiffs' counsel proposed to establish by evidence, that it was not a final and conclusive adjustment of all the existing debits and credits between the parties. Into the examination of most of these arguments the court below has entered with a view to estimating and repelling their sufficiency, to shake the settlement in which the lien of the settlements is claimed. But we cannot feel ourselves at liberty to pursue the same course; since it supposes the existence of a revising power inconsistent with the authority of adjudications on which the validity of those liens must now be placed. The rule of law being once established by the highest tribunal of a state, courts which propose to administer the law as they find it, are ordinarily bound, in limine, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, pro or con, upon the point under consideration, had been examined and disposed of judicially.

It is next contended that the judgment of March 1797, had absorbed or superseded the liens of the settled accounts.

This ground they proposed to sustain by giving in evidence the journals of the house of representatives of the commonwealth, exhibiting certain reports of the register-general and of the committee of ways and means, conducing to prove that this judgment was rendered for the identical cause of action on which the settlements were founded. This evidence was rejected by the court; and that rejection constitutes one of the causes of complaint on which relief is now sought here.

But this court is satisfied that, supposing the evidence of these journals sufficient to prove the identity, and in other respects unexceptionable, establishing that fact would not have benefited the cause of the plaintiffs. On this point there is an unavoidable inference to be drawn from the case United States v. Nichols; for in that case, the lien of a settlement of prior date in favour of the state, was sustained against a subsequent mortgage to the United States; although, as the case shows, there was a judgment upon the same cause of action with the settlement, of a date subsequent to the mortgage to the United States, and obtained upon an appeal from the settlement.

Mr Dallas, for the United States, argued, that this appeal suspended the lien; but no one seems to have imagined that the judgment superseded or absorbed the settlement. If to this be added what was asserted by defendants' counsel, and acquiesced in by the plaintiffs'; that by the settled law of Pennsylvania, a judgment in an action of debt upon a previous judgment, does not destroy the lien of the first judgment, it puts this question at rest.

In approaching the acts of 1806 and 1807, we are then authorized in assuming, that at the time they were passed the state held unsatisfied liens upon the lands of John Nicholson to a large amount, under the two settlements of 1776, without any legal means of raising the money by sale; and also judgments to a great amount, which, by reason of the death of Nicholson, and the want of a personal representative, they were equally precluded from all ordinary means of having satisfied. Thus circumstanced, the legislature passed those acts, the professed and unaffected and only object of which was to raise, from the sale of John Nicholson's land, money sufficient to satisfy the liens of the state. In justice to the moral as well as legal and constitutional character of those laws, it is proper to give an outline of their provisions.

It is obvious from the evidence in the cause, that between the date of the settled accounts and the passing of those acts, great changes had taken place in the possession and property of the lands of John Nicholson. Whether in any or all the cases of such change of property, the tracts sold became discharged of the liens of the state or not, is not now the question: if they were, the holders were at liberty to assert their rights against the state. In this case no such discharge is set up; the tract was one that had remained the property of Nicholson. There were then three interests to be regulated; first, that of the state; second, that of the persons in possession; and third, that of the heirs of Nicholson. That the state was not unmindful of the last, is distinctly shown by the offer of compromise tendered to the family before the act of 1806 was passed, and by adopting a mode of sale calculated as much as possible to avoid throwing back the purchaser upon the heirs for damages, where sales had been made by their ancestor. Hence, the plan of the act of 1806 was this: first, to ascertain

all the lands affected by the lien throughout the state; then to assess each rateably, according to the amount of the debt, instead of selling each and all as they could be discovered; at the same time allowing a discretion in the commissioners to compromise with persons claiming an interest in the lands, and to assign over an interest in the lien proportionate to the sum received upon such compromise; of course, obviating, so far, the necessity of a resort to a sale or to litigation.

Here there was a general offer to all persons claiming an interest in these lands, of a release from the lien, upon paying the sum thus assessed rateably and according to value; and it was only when the offer was not accepted, or where no one claimed an interest, that the general power to sell came into exercise. Nor was it then to be exercised until after a report made to the governor, and under process issuing from him: ample notice was required to be given of the sale, and a credit not exceeding four years allowed. It is true, that by the terms of these acts, the power of selling is extended to "any body of lands, late the property of the said John Nicholson deceased, *which are subject to the lien of the commonwealth*, under and by virtue of process to be issued by the governor, either in gross or by separate tracts, as to them, or a majority of them, may appear most advisable;" but there is nothing which authorizes or requires the commissioners to sell *all the lands* of J. Nicholson, or an acre more than what is necessary to satisfy the liens: and so the words, just recited, import; since, after raising by sale enough to satisfy the liens, it could no longer be predicated of any of those lands that "they are subject to the liens of the commonwealth," in the language of the section which gives the power to sell. And it is true also, that the money is required to be paid by the purchasers into the treasury; but this is obviously a measure solely intended to secure the proceeds from again falling into dangerous hands; and if the power to sell be limited by its very nature and terms, to the raising of enough to satisfy these liens, on what ground can exception be taken to this precaution? How can it work an injury to heirs or creditors? to say nothing of a reasonable dependence upon the justice and good faith of the country to refund any surplus, supposing the commissioners were at liberty to raise a surplus by sale.

Nor can any reasonable exception be taken to the discretion-

ary power given to sell "in gross or by separate tracts;" when it is considered how very possible it was that sales might be effected in gross when they could not be made in detail. Speculators might not be induced to adventure otherwise, and the separation of contiguous tracts might often destroy or diminish the value of each.

After presenting this exposé of the design and operation of these laws, we shall search in vain in the constitution of the state or the United States, or even in the principles of common right, for any provision or principles to impugn them: and on this point I am instructed to report it as the decision of this court, that the words used in the constitution of Pennsylvania, in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of Nicholson in the two acts under consideration, and that there are no restrictions, either express or implied, in that constitution, sufficient to control and limit the general terms of the grant of legislative power to the bounds which the plaintiffs would prescribe to it.

For myself, individually, I must use the privilege of assigning the reasons which claim my concurrence in that opinion.

The objection made to the exercise of this power is, that it is one of a judicial character, and could not exist in the legislature of a country having a constitution which distributes the powers of government into legislative, executive and judicial.

I will not pause to examine the question, whether the subjection of property to the payment of judgments, be in fact a matter appertaining essentially to *judicial* power; or whether, after deciding that the debt is due, the judgment action does not cease, and all that follows is the exercise of legislative or executive power; another view of the subject will, in my opinion, dispose of this question.

The power existing in every body politic is an absolute despotism: in constituting a government, the body politic distributes that power as it pleases, and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural distribution and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious that every community may make a perfect or imperfect separation and distribution of these powers at its will. It has pleased Pennsylvania, in her constitution,

to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction in its full latitude into her jurisprudence: and the consequence is, as it ever will be, that so far as her common law courts are incapable of assuming and exercising that branch of jurisdiction, her legislature must often be called upon to pass laws which bear a close affinity to decrees in equity. Of that character are the acts of 1806 and 1807 under consideration. The relations in which the state and John Nicholson's estate stood to each other, presented a clear case for equitable relief; a lien on the one hand, and property to satisfy it on the other, but no common law means of obtaining a sale. Thus circumstanced, is there any thing in the constitution of Pennsylvania to prevent the passing of these laws?

When it is intimated that the separation of the primary powers of government is incomplete under the constitution of Pennsylvania, it may be necessary to submit a few observations explanatory of the idea.

It is true that the separation of common law from equity jurisdiction is peculiar to Great Britain; no other of the states of the old world having adopted it. But it is equally true that in no other of the states of the old world did the trial by jury constitute a part of their jurisprudence, and every practical lawyer knows that to give jurisdiction to a court of equity, or to distinguish a case of equity jurisdiction from one of common law under the British practice, the averment is indispensable that the complainant is remediless at law. When it is said that the separation of common law from equity jurisdiction is peculiar to Great Britain; it must only be understood, that it is there exercised by distinct courts and under distinct forms. For, as an essential branch or exercise of judicial power, it is acknowledged to exist every where: nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist some where; or the administration of justice will be embarrassed if not incomplete. To administer it through the ordinary powers of a common law court is impracticable; and hence, wherever there exists no provision

in the jurisprudence of a country for its full exercise; the consequence must ever be, that after the common law courts have ingrafted into their practice as much as can be there assumed, the legislature is compelled to exercise the rest; or else leave a large space for the appropriate field of judicial action unoccupied.

A specimen of this will be found in the early legislation of the state of South Carolina, in which, before the establishment of a court of equity, laws are frequently found authorizing administrators or others to sell lands for the payment of debts, and for similar purposes. And it has been admitted in argument, that similar laws are of frequent occurrence in Pennsylvania.

The provisions of the constitution of that state on the subject of legislative and judicial power, are as follows. Art. 1, sect. 1. "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives."

Art. 4, sect. 1. "The judicial power of the commonwealth shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphan's court, register's court, and a court of quarter sessions of the peace of each county, in justices of the peace, and in *such other courts* as the legislature may from time to time establish."

Art. 4, sect. 6. "The supreme court and the several courts of common pleas, shall, besides the powers heretofore usually exercised by them, have the powers of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, and the care of the persons and estates of those who are non compos mentis; and the legislature shall vest in the said courts such other powers to grant relief in equity as *shall be necessary*, and may from time to time enlarge or diminish those powers, or vest them in such other courts as they may judge proper for the due administration of justice."

It is clear from these quotations, that the legislature possess all the legislative power that the body politic could confer, except so far as they are restricted by the instrument itself. It is equally clear that the constitution recognizes the distinction between common law and equity powers, and the existence of equity powers beyond what it has vested in the supreme court.

But what provision has it made for the exercise of those powers? No other than this, that the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary. But where is the limitation prescribed to the legislature in judging of the necessity of vesting such powers? They have not thought it necessary to invest their courts with such powers: and if the reason which influenced them in judging it unnecessary was, that they held themselves competent to afford the necessary relief by the exercise of legislative power; where is the restriction in the constitution that controls them in thus extending or applying the powers with which they hold themselves to be constitutionally vested? They are sought in vain.

Again, "they may from time to time enlarge or diminish those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice." Now they have, by the first section of the same article, the power to establish what courts they please; and suppose they thought proper to have vested the whole equity jurisdiction not specifically disposed of, in a board of commissioners, instead of vesting specific powers in such a board, where is the constitutional provision that inhibits such an act of legislation?

The plaintiffs contend that it is to be found in the bill of rights of that state or in the constitution of the United States.

Both those constitutions contain the provision against the violation of contracts; and the plaintiffs' counsel insists that there were three contracts in existence between the state of Pennsylvania and John Nicholson, two of them express, and one implied.

The first express contract he finds in the acts of 1782 and 1785; which, in giving the lien upon public accounts, declare that they shall be liens "in the same manner as if judgment had been given in the supreme court." This he construes into a contract that they shall be enforced in the same manner as such a judgment, to wit by judicial process; and then finds the violation of the contract, in the acts which provide for the raising of the money to satisfy those liens by the sale of the land, through this board of commissioners. But a single observation we think disposes of this exception; which is, that the lien of a judgment, of a mortgage, or any other lien, is a

very different idea from that of the means by which the lien is to be enforced; the one is the right, the other is the remedy: the one constitutes the contract, and the other the remedy afforded by the policy of the country, where it is not provided by the terms of the contract, for enforcing or effecting the execution of it. The first is unchangeable, without a violation of right; the other may be subject to change at the will of the government. And, it may be further observed in the present instance, that the reference to a judgment in the supreme court, is clearly descriptive or illustrative of the meaning of the legislature, with reference only to the *binding efficacy* of the lien given on these public accounts.

The second express contract is found by the plaintiffs in the confession of judgment on the 21st March 1797; and the violation of this also, is not enforcing it by judicial process.

This is obviously an attempt to give the character of a contract to that which is nothing more than an obligation, or duty, or necessity imposed by the laws of society. The confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action. But on the side of the plaintiff, the necessity of resorting to certain means of enforcing that judgment, is not an obligation arising out of contract, but one imposed upon him by the laws of the country.

Again, it may be answered, if there was in fact such a contract imputable to the state, the performance had become impossible by the act of God, and of the party himself, by his death; and by that confusion of his affairs, which prevented every one from assuming the character of his personal representative.

We proceed to the third, or the implied contract; that which is deduced from the original grant of the land to John Nicholson. This sale, it is insisted, is inconsistent with that contract of grant; that it amounts in fact to a resumption of the land: and in connexion with this, the point of inconsistency with the reason and nature of things, was argued and commented upon.

The answer which the case here furnishes we think is this: that subjecting the lands of a grantee to the payment of his debts, can never impair or contravene the rights derived to

him under his grant, for in the very act, the full effect of the transfer of interest to him is recognized and asserted: because it is his, is the direct and only reason for subjecting it to his debts.

But it is asserted that in this case the community sits in judgment in its own cause, when it affirms the debt to be due for which the land is subjected to sale, and then subjects the land to sale to satisfy its own decision thus rendered.

This view of the acts of the state, is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797, that is unquestionably a judicial act; and as to the settled accounts, the lien is there created by the act of men who, quoad hoc, were acting in a judicial character; and their decision being subjected to an appeal to the ordinary, or rather the highest of the tribunals of the country, gives to those settlements a decided judicial character: and were it otherwise, how else are the interests of the state to be protected? The body politic has its claims upon the constituted authorities, as well as individuals; and if the plaintiffs' course of reasoning could be permitted to prevail, it would then follow, that provision might be made for collecting the debts of every one else, but those of the state must go unpaid, whenever legislative aid became necessary to both. This would be pushing the reason and nature of things beyond the limits of natural justice.

It is next contended, that the acts of 1806 and 1807 are unconstitutional and void, because contrary to the ninth section of the Pennsylvania bill of rights, which provides, in the words of magna charta, that no one shall be deprived of his property but by the laws of the land.

This exception has already been disposed of by the view that has been taken of the nature and character of those laws. It has been shown that there is nothing in this provision either inconsistent with natural justice or the constitution of the state: there is nothing of an arbitrary character in them.

They are also charged with being contrary to the ninth article of the amendments of the constitution of the United States, and the sixth section of the Pennsylvania bill of rights, securing the trial by jury.

As to the amendments of the constitution of the United States, they must be put out of the case; since it is now settled

that those amendments do not extend to the states: and this observation disposes of the next exception, which relies on the seventh article of those amendments. As to the sixth section of the Pennsylvania bill of rights, we can see nothing in these laws on which to fasten the imputation of a violation of the right of trial by jury; since, in creating the lien attached to the settled accounts, the right of an appeal to a jury is secured to the debtor: and as to the inquest given under the execution law, with a view to ascertaining if the rents and profits can discharge the debt in a limited time, as a prelude to the right of selling; we are well satisfied that there is no more reason for extending the provision of the amendment to that inquest, than there would be to the inquest of a coroner, or any other mere inquest of office. The word *trial*, used in the sixth section, clearly points to a different object; and the distinction between trial by jury and inquest of office, is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time without any danger to private security; the other is justly regarded in every state in the union, as among the most inestimable privileges of a freeman.

The two remaining grounds urged for impugning the constitutionality of these laws, have been disposed of by observations already made.

It only remains to consider the point made upon the rejection of certain evidence proposed to be introduced; the object of which was to invalidate the settled accounts, by showing that, in fact, the accounts between the state and Nicholson never were settled, that is, finally and conclusively settled. Here again, as was remarked of the evidence already considered, admitting the fact proposed to be proved, what could it avail the party in this suit? As far as the accounts were settled and certified, the law gave the lien for the amount certified; and why should that benefit be deferred until the last possible shilling in dispute should be finally passed upon; delayed perhaps until lost, or until the debtor could no longer parry the decision; and thus give a preference to others at his will?

If, then, the fact intended to be established by the evidence

could not have availed the plaintiffs, the court could have committed no error in rejecting it, whatever may have been the reasons given for the rejection.

We are of opinion that there is no error in the judgment below, and it will accordingly be affirmed, with costs.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Pennsylvania, and was argued by counsel: on consideration whereof it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs.

George Morris and David Gwynne, plaintiffs in error v. The Lessee of Josiah Harmer's Heirs.

Ejectment for a lot of ground in the city of Cincinnati.

A question as to the admission of evidence of the declaration of a deceased person, as to boundary.

Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works, of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not pre-suppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence.

The work of a living author who is within the reach of the process of the court, can hardly be deemed of this nature. He may be called as a witness; he may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say that his book was not, under such circumstances, the best evidence within the reach of the parties.

Special circumstances, which were considered as exempting the evidence contained in a book, called the "Picture of Cincinnati," of the date of the survey of the city and laying out lots in part of the same, from the common rule, which justified its admission.

The plat of the lots in the city of Cincinnati, which had been recorded, and on which the streets and alleys in the same were designated, and which had been generally recognized and used in the surveys of the lots laid down in the same, was properly admitted in evidence.

The legal title to lands in Ohio can only be passed by a proper conveyance by deed, according to the laws of that state.

IN error to the circuit court of the United States for the district of Ohio.

This was an action of ejectment prosecuted by Eliza Harmer, Josiah Harmer and William Harmer, children and heirs at law of Josiah Harmer, deceased, against George Morris and David Gwynne, to recover possession of a part of a town lot in the city of Cincinnati.

On the trial of the cause, the defendants excepted to the admission of certain evidence, and to the instructions given by the court to the jury upon matters of law.

To reverse the judgment in favour of the plaintiffs, they prosecuted this writ of error.

The case was was argued by Mr Ewing, for the plaintiffs in error; and by Mr Caswell, for the defendants.

The facts of the case, and the questions of law which were presented for decision, are fully stated in the opinion of the court.

Mr Justice Story delivered the opinion of the Court.

This is a writ of error to revise the judgment of the circuit court for the district of Ohio, rendered against the plaintiffs in error, who were the original defendants in an action of ejectment, commenced in that court in 1828.

The original suit is for a lot of land situate in Cincinnati. The original plaintiffs are the heirs of Gen. Josiah Harmer; and claim title to the premises under a deed executed by John Cleves Symmes, then proprietor of the lands, including the whole city, on the 6th of May 1791, acknowledged on the 28th of November 1804, and recorded on the 30th of the same month. The boundaries stated in the deed are as follows: "on the south on the front or river street, lying directly in front of fort Washington, being twelve rods wide on the street, including two lots, and extending northerly from the said front street twenty rods to the south side of the second street from the Ohio, and adjoining the said second street twelve rods from east to west; and on the east bounded by the lands of his excellency governor St Clair." These lots were without the original bounds of the city. At the time when this deed was executed, Symmes had not procured a legal title thereto under his contract with the United States for his purchase; but he subsequently obtained it in 1794.

The defendants, at the trial, set up title to the premises derived under one Ethan Stone, who purchased the lands mentioned in the deed from Symmes to Harmer, at a sheriff's sale, on an execution by one Lamma against Symmes, and as his property, in March 1803.

At the trial there was a good deal of evidence as to the location and boundaries of the lots conveyed by the deed of Symmes to Harmer, and comprehending the premises; and this consti-

tuted one of the points in controversy. The defendants also, to rebut the plaintiffs' title, gave in evidence the record of the proceedings in a suit in chancery, prosecuted by Harmer against Stone in the supreme court of Ohio in 1811; the object of which was to procure a decree against Stone for a release and surrender of his title to these lots, under the sheriff's sale; upon the ground expressly stated in the bill, that the deed of conveyance from Symmes to Harmer, in 1791 (the former having then acquired no legal title), conveyed only an equitable title to Harmer, and that Stone had full notice thereof at the time of his purchase under the sheriff's sale. Pending the proceedings, Harmer died, and the suit was revived in behalf of the widow and heirs of Harmer; all of whom, except one, were then under age, and prosecuted their suit by their mother as their next friend. Afterwards, in 1817, a decree was made in favour of the plaintiffs, directing Stone to release all his title to the land according to the boundaries contained in the deed from Symmes to Harmer; and to yield up the possession accordingly. The heirs of Harmer did not all arrive at age until 1825. After the rendition of this decree, one George W. Jones was employed by Mrs Harmer to procure a release from Stone pursuant to the decree. He testified that he came to Cincinnati in 1821. That before leaving the city of Philadelphia, Mrs Harmer requested him to take the agency of their claim in Cincinnati, then in the hands of Jesse Hunt, and to receive a conveyance from Stone of the lands decreed to the heirs of Harmer, and take possession of the same. That, at that time, all the heirs except one were minors, and with her who was of full age, he had no conversation respecting the matter; nor had he any written authority to act as agent for any of them. That after his arrival at Cincinnati he applied to Stone for a conveyance; and after some difficulty and delay, he got him to go upon the ground in company with Mr Este, the attorney at law for Harmer's heirs, and Mr Gest, a surveyor, and the land was set off by Stone, as he (Stone) claimed was correct. The surveyor handed him a plan of survey; and Stone executed a release of the same to Harmer's heirs. That the witness knew nothing of the situation of the town, or the true locality of the lots. He had no agency in, nor did he ever know of the additional description of the four town lots as men-

tioned in the deed of release made by Stone; nor did he know that it conveyed other or different ground than was described in the deed made by Symmes to Harmer.

It was also proved on the part of the plaintiffs, that in 1824 an execution was issued against Stone, and levied upon a triangular piece of ground at the junction of Ludlow and Front streets (part of the premises included in the deed of release of Stone, and contended to be not included in the deed of Symmes to Harmer), as Stone's property, and bought at the sheriff's sale, in February 1825, by one Timothy Kirby, who afterwards, in June 1827, conveyed the same to Jones; and Stone afterwards, in August of the same year, upon a representation that it was bought by Jones for Harmer's heirs, to quiet their title, executed a release thereof to Kirby.

It was also proved that Harmer's heirs have always been in the undisturbed possession of the land released by Stone to them, under the decree.. That about the year 1821 or 1822, Josiah Harmer, one of the heirs, then a minor, but who came of age in 1823, came to Cincinnati; and wishing to erect a house on the corner of the triangular piece of ground above referred to, contracted for the building of the same, which was erected thereon, and has ever since been in the possession and occupancy of persons holding under Harmer's heirs, and paying rent to them.

This statement of facts is necessary to understand the instructions prayed of the court, which will hereafter come under consideration. Before proceeding to consider them, it will be proper to dispose of some minor exceptions taken to certain evidence, which was admitted at the trial.

It has been already stated, that one of the points of controversy at the trial was as to the true location and boundary of the lots conveyed by Symmes to Harmer. One Thomas Henderson, a witness, among other things, testified that "he had heard a number of the old citizens of Cincinnati, now dead, speak of the situation of the lots sold by Symmes to Harmer; and named particularly Joel Williams, one of the old proprietors of the other part of the town, and David Zeigler, who, he said, was the reputed agent of Gen. Harmer; and in the conversation spoken of, warmly censured Ethan Stone for attempting to take from Harmer his property." The defendants ob-

jected to the admission of Zeigler's declaration, *as to the location of said lots;* which objection was overruled by the court, and the statement of said Zeigler, as testified by said witness, was admitted in evidence to the jury. The defendants excepted to the admission of this evidence.

It is observable that the exception is not general to the declarations of Zeigler, but only to that which respected the location of the lots. Nor does it appear that any declaration of Zeigler was given in evidence, except what is above stated. Now, if Zeigler made no other declaration, or the plaintiffs waived giving any other declaration in evidence, notwithstanding the court ruled it to be admissible, it is difficult to perceive how this exception can be maintained, or how the defendants have been prejudiced. As far as Zeigler's declaration is in evidence, it is merely introductory, that he spoke "of the situation of the lots;" and it no where appears that any further declaration, except in this general way, was in evidence. Such a statement, so utterly inconsequential, cannot form any proper matter of exception. It proves nothing; and can be considered in no other light than as the introductory language of the witness himself.

The plaintiffs then offered to read from Dr Drake's work, called a picture of Cincinnati, the date of the surveying and laying out lots in that part of Cincinnati which lies east of the garrison reservation. To the admission of this book in evidence, the defendants objected; the author being (as was agreed) alive, and his deposition, as to other matters, taken in the cause. The court overruled the objection, and admitted the evidence to go to the jury. To this decision, also, the defendants excepted.

If this exception were to be considered solely upon the general principles of the law of evidence, we should think that it was well taken. All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. Historical facts, of general and public notoriety, may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the trans-

actions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. See 1 Starkie's Evid. pl. 1, sect. 40 to 44, p. 60 to 64; 1 Starkie's Evid. pl. 2, sect. 55, p. 180, 181. But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties.

But we think there are special circumstances in this case which exempt the evidence from the common rule, and justify its admission. Doctor Drake had been already used by the defendants as a witness in the cause, on the point as to location and boundary of the lots. He stated, among other things, that he was present when Joseph Gest, the city surveyor, made a survey of the foundation of old fort Washington, a plat and description of which, by Gest, was then before him, and was in the case: and after stating his belief of its accuracy, and his reasons for so believing, he added, "finally, in preparing a plat of the town for the picture of Cincinnati in 1814, I took great pains to lay down the site of the fort correctly, and I find that the plat made by Mr Gest corresponds almost exactly with it." And in answer to a further question of the defendants, what would be the location of four lots, the calls for which were directly in front of fort Washington; he stated, "they must all lie between Ludlow street and Broadway, that is, west of Ludlow street." Now, these answers, which were brought out upon the defendants' own inquiries of their own witness, seem to us to justify the admission of the book of Doctor Drake, for the purpose of explaining, qualifying, or controlling his evidence. The remarks of Dr Drake in his book, as to the date of the surveying and laying out lots in that part of Cincinnati which lies east of the garrison reservation, (and which was comprehended in the scope of his testimony,) might have been important for this purpose: and at all events, the plaintiffs might properly refer to this book to show statements, which

might affect the results of his testimony. In this view we think the evidence was admissible; and its bearing in any other view is not shown to have been in the slightest degree material to the cause.

The defendants subsequently offered in evidence a map contained in the same book, it being a plan of the town of Cincinnati, exhibiting the same plan of the town as that offered by the plaintiffs, except that the four first lots were not numbered. The plaintiffs then produced another plat marked No. 3, and again called Henderson, who testified that he saw the plat for the first time in 1809, while the depositions in perpetuum used in this cause were taking. That the said plat was shown to him by John C. Symmes, in the presence of Daniel Symmes. That the writing thereon, and the lines, but not the numbers, were then put upon it in the hand writing of J. C. Symmes. That in 1811 the said plat was again shown to him, at which time the figures numbering the lots were upon it, and he recognized these figures as being in the hand writing of Daniel Symmes. That he, then, at the request of the proprietors and several of the old citizens of the town, copied the plat, protracting it on a larger scale, and placed his copy on the records of the county; and that the same has since governed him, and all other surveyors, as far as he has known, in surveys made in that part of the town, now city of Cincinnati. That this plan was recorded for the purpose of preserving the original plan of that part of the town which was laid out by J. C. Symmes; and the inhabitants of Cincinnati have since recognized it as the true plan of the said part of the town, *except Ethan Stone*, then in possession of the block in which the land in controversy is situated, who denied its correctness. That this was the only plan of that part of the city known and recognized by the citizens of Cincinnati; that the size and number of the streets and alleys were determined with reference to that plan; that all the surveys of the lots, streets and alleys in that part of the city were made with reference to that plan, so far as he knows; that he never knew of any other plan; and no other was ever adopted as the plan of the upper part of the town. The plaintiffs thereupon offered the said plat in evidence to the jury, for the purpose of showing the original plan of that part of the city. The defendants

objected to its admission. The court overruled the objection, and admitted the plat in evidence; directing the jury to disregard any thing written on it by J. C. Symmes. An exception was taken to this decision of the court, and the question now is upon its correctness.

We are of opinion that the plat, upon this evidence, was rightly admitted. It is to be considered, that J. C. Symmes was the original proprietor of the whole city when it was laid out; and that the plat was in his possession, and held out by him as the original plat. It was traced back to that possession more than twenty-two years before the trial; and was the oldest and only original plat known to be in existence. It was a publicly recognized plat by which the corporate authorities and citizens ascertained, and regulated their surveys, lots, streets, and alleys. And having been so long and so publicly recognized, it was the highest species of evidence of reputation as to the location and boundaries of the lots, streets, and alleys; and not the less so because it was contested by a single individual, whose interests might be affected by it. It was not conclusive upon his rights, but it was admissive as the best proof then known to the plaintiffs of the general laying out and boundaries of the lots and streets of the city, recognized by the original proprietor, and those who had succeeded to his rights, as well as by the public. But if this were even doubtful (which we do not admit), it would still be admissible; since it is not even pretended, that it differed in any material circumstance from other plats then laid before the jury by both parties, except as to the figures numbering the lots; and these the court directed to be disregarded. The question, therefore, made at the bar as to the admission of hearsay, post litem motam, does not arise, and may well be left for decision, until it constitutes the very point for judgment. It has, indeed, been suggested at the bar, that Symmes produced the plat after Stone had obtained his title to the premises, and therefore had an interest to maintain the title of Harmer, in order to escape from his warranty to the latter under his deed of 1791. But no such interest could exist; for whatever was the true location of the lots conveyed by that deed, Symmes undoubtedly had the title at the time: and Stone, not being a second purchaser by deed from Symmes, but a mere purchaser

at a sheriff's sale on execution, could take only such title as Symmes then possessed in the premises. And the not recording of the deed to Harmer until after Stone's purchase, will not affect Harmer's title (it being clearly good between the parties), as it might have done if Stone had been a subsequent purchaser from Symmes by deed, without notice. The plat, then, came from Symmes's possession at a time when he had not even a semblance of interest in the controversy.

We now come to that which constitutes the main hinge of the present suit, and by which its ultimate merits are to be decided; and that is, the instructions given and refused by the court.

The first instruction was prayed for by the plaintiffs, and is as follows. "The counsel for the plaintiffs move the court to instruct the jury that inasmuch as they claim title to the premises in dispute under the deed from Symmes to Harmer, and not under the deed of release made by Stone, they cannot be divested of their title to the lots which that deed conveyed to Harmer, by the possession of these premises for the period of five or six years, which they supposed to be a part of these lots, though embraced in the deed of release, but not in the decree;" which instruction the court accordingly gave. It does not appear upon the record, that this instruction so given was in express terms excepted to by the defendants; the exception being stated in the following terms, after the instructions asked by the defendants. "The court charged the jury as requested by the defendants upon the first instruction asked *by them;* but refuse the residue of the instructions in manner and form as the same were prayed for; *to which several opinions of the court in delivering their charge as aforesaid, the defendants except, &c.*" But we think, that the fair import of these last words embraces the instruction asked by the plaintiffs; for that was an opinion delivered by the court in its charge to the jury.

That the deed of Symmes to Harmer, in 1791, passed a legal title to Harmer, which became consummated in the latter when Symmes obtained his patent from the United States in 1794, is not controverted. The question is, whether the subsequent proceedings under the bill in equity, in which that title is asserted to be equitable, and the release given by Stone

under that decree, and the subsequent possession of the heirs of Harmer of the lands so released, do, under the circumstances, estop them from setting up their legal title against the defendants. We are of opinion that they do not.

It is very clear that Mrs Harmer could not, as prochein ami, during the minority of the heirs, authorize any release to be taken, which did not conform to the decree, so as to make it binding upon them. In point of fact, if the evidence is to be believed, the agent never intended to take any release which did not conform to the decree; and he received it upon Stone's representation that it did so conform. And it no where appears from the evidence, that the heirs had any knowledge of their rights, and of the mistake in the release, until the present suit was brought. Unless the heirs had full knowledge of their rights, and of the mistake in the release; and with that knowledge held possession of the premises in the release after they arrived of age; they could not be deemed to have confirmed the transaction, or to have accepted the release as full satisfaction and performance of the decree.

We give no opinion what under such circumstances would have been the effect of such acquiescence or confirmation upon the rights of the plaintiffs derived from the decree; or whether afterwards they would be permitted to repudiate the whole transaction, and compel a new execution of the decree. Here, the title, set up by the plaintiffs, is not derived from or under the decree or release; but is a legal title paramount to both. Are the plaintiffs then estopped in law to set up that title? We think not. The bill in equity does not estop them; for that bill stated the derivation of title correctly; and the decree conforms to it. Neither the title set up in the bill, nor the decree, asserts any claim repugnant to the present claim. The decree requires Stone to convey the very land in controversy. The only difficulty is, that the bill avers the title of the plaintiffs to be an equitable instead of a legal title. But as all the facts are stated truly in the bill, it is nothing more than a mistake of law. If the defendants could rely upon that bill and decree as an estoppel, it must be because the facts therein stated are repugnant to the present title asserted by them. But such is not the posture of the case.

The plaintiffs then, having a legal title to the premises,

which they have never parted with by a proper conveyance, they are entitled to the instruction prayed for; unless their possession of the land under the release, not included in the decree, amounts in law to an extinguishment of their title. We know of no principle of law, on which this can be maintained.

The legal title to land in Ohio can be passed only by a proper conveyance, by deed, according to the laws of that state. The present is an attempt to set up a parol waiver of title by acts in pais; a parol acceptance of other land, in lieu of that belonging to the plaintiffs. As an extinguishment, or an estoppel, it is equally inadmissible. The question is quite a different one, what would be the effect of such an acceptance and acquiescence under it by the parties for a long time, as matter of evidence upon a point of disputed boundary. The instruction given involves no such consideration. It prevents the more general question whether the possession of the released premises, precluded the plaintiffs from asserting their legal title to the land sued for. We concur with the court below in thinking that it did not.

The first instruction asked by the defendants, having been given by the court, may be passed over without notice. The second, third, fourth and fifth instructions are as follows:

2. If, upon the whole evidence, the jury believes that Mrs Harmer, the next friend of the minors, in prosecuting the bill in chancery, and obtaining the decree given in evidence, authorized George W. Jones to obtain the deed of release, under the decree, and to take possession of the lands, and that George W. Jones, under this authority, as agent for the complainant obtaining the decree, and, in conjunction with the attorney for the complainants that obtained the decree, assented to the location of the ground; and George W. Jones, as such agent, accepted a deed, and took possession of the land according to the boundaries described in the deed: the lessors of the plaintiff are concluded by his acts, and the plaintiffs cannot recover.

3. If, upon the whole evidence, the jury believe that Mrs Harmer, the next friend of the minors in prosecuting *the* bill in chancery, and obtaining the decree given in evidence, authorized George W. Jones to obtain the deed of release, under the decree, and to take possession of the lands; and that George

W. Jones, under this authority, as agent for the complainants obtaining the decree, and, in conjunction with the attorney for the complainants in obtaining the decree, assented to the location of the ground, and George W. Jones, as such agent, accepted a deed, and took possession of the land according to the boundaries described in such deed, and continued that possession, exercising acts of ownership as agent after all the lessors of the plaintiff obtained their full age; and the defendants purchased before the lessors of the plaintiffs disavowed the acts of George W. Jones, and without any notice or knowledge of an intention of the lessors of the plaintiffs to disavow the acts of said Jones, public sale of the adjacent lands being made, with the knowledge of said Jones, and no notice given by him that the lessors of the plaintiffs (he continuing their agent) had disavowed, or intended to disavow, his acts in locating the lands, and taking a deed for and possession thereof: the plaintiffs cannot recover.

4. That the deed of release from E. Stone to T. Kirby, and the decree from the sheriff to T. Kirby, given in evidence in this cause, for part of the lands previously released by E. Stone to the lessors of the plaintiffs, under the decree, in execution of a contract paramount to the original title of E. Stone, and decreed to be executed, did not, in law, divest the title of the lessors of the plaintiffs, previously acquired to the lands so released by E. Stone to Kirby, and conveyed by the sheriff to Kirby, and the continuance of the lessors of the plaintiff in possession of all the land released to them, under the decree, and taken possession of by George W. Jones, and retaining the title thereto, is, in law, a continued affirmance of the acts of George W. Jones as their agent, which cannot be disavowed without releasing to E. Stone, and restoring to him the possession of that fraction of the land, released under the decree which the location claimed in the first does not cover.

5. That the relation in which the defendants are proved to stand to those under whom they claim title, does not warrant the jury to infer that the defendants had knowledge that the lessors of the plaintiffs had disavowed, or intended to disavow, the location as accepted by George W. Jones.

The second instruction proceeds upon the ground, that the authority given by Mrs Harmer to Jones, his assenting to ac-

cept the release of Stone, and taking possession of the land released, concluded the plaintiffs from a right to recover; although they were minors, and never personally assented thereto. From what has been already said, this instruction was properly refused. Mrs Harmer had no authority to bind the heirs by the acceptance of any release, not conforming to the decree.

The third instruction proceeds upon the ground, that the acceptance of the release by Jones, under the authority of Mrs Harmer, and the possession of the land by Jones as agent, and continuing that possession after the plaintiffs attained full age, and until after the defendants had made their purchases of the land, without any disavowal or notice of disavowal by the plaintiffs of the acts of Jones; would preclude the plaintiffs from a right to recover. We think, for reasons already given, the law is otherwise, and therefore the instruction was rightly refused.

The fourth instruction affirms, that the release of Stone to Kirby for part of the land included in the prior release of Stone, under the decree, did not divest the legal title of the plaintiffs to the lands so released to them. So far the instruction prayed was undoubtedly correct. But it did not stop here, but proceeded to declare that the continuance of the plaintiff in possession of the land so released by Stone, under the decree, was a continued affirmance of the acts of Jones as their agent, which could not be disavowed without releasing to Stone, and restoring to him the possession of that fraction of the land released, which the decree did not cover. To this instruction there are two objections. The first is, that if the release to Kirby by Stone, and the conveyance by Kirby to Jones, were for the exclusive benefit of the heirs of Harmer, and to quiet their title to that fraction of land, (as the evidence in the case asserts,) no such release could be now required, since the plaintiffs would be entitled to it by an independent title. But the other is equally decisive. If the plaintiffs possess a legal title to the land in controversy, not founded on that release, it can furnish no bar to their right to recover, that there exists an equitable claim against them to surrender other land taken under that release, to which ex æquo et bono, they are not entitled. The instruction was, therefore, properly refused.

The fifth and last instruction proceeds upon the ground, that

knowledge on the part of the defendants, that the plaintiffs had disavowed, or intended to disavow, the location as accepted by Jones, might vary the right of the plaintiffs to recover; and that the relation in which the defendants are proved to stand to those under whom they claim title, did not warrant the jury to infer, that the defendants had that knowledge. This instruction is open to the objection, that it asks the court to decide upon a matter of fact, as to what the relation was, in which the defendants were proved to stand, to those under whom they claimed title. But the decisive answer is, that it asks an instruction upon a point of law, not shown to have any legal bearing upon the case. It could have no influence upon the cause, if given, and might have had a tendency to mislead the jury. It was, therefore, properly refused by the court.

The judgment of the circuit court is affirmed, with costs.

Ex parte Tobias Watkins.

Habeas corpus. W., at May term 1829 of the circuit court of the district of Columbia, was tried upon three indictments for offences against the United States, and was sentenced on each to imprisonment for three months, and to pay a fine, on one indictment of two thousand dollars, on another of seven hundred and fifty dollars, and on another of three hundred dollars, with the costs of prosecution. No award was made on either judgment, that W. should stand committed until the sentence be performed. W. was, under these sentences, committed to jail by the then marshal of the district, and upon the expiration of his office, and the appointment of his successor, after the term of W.'s imprisonment was exhausted, he was delivered over in jail, with other prisoners, to his successor, and has ever since been detained in custody. The time of imprisonment expired on the 14th May 1830. On the 3d September 1829, the district attorney sued forth three several writs of fieri facias to levy the fines, which were returned "nulla bona." On the 16th February 1830, three writs of capias ad satisfaciendum were issued against W. for the fines, returnable to the next term of the court in May, which writs commanded the marshal to take W., and him safely keep, and have his body before the circuit court on the first Monday of the term, to satisfy the United States for the fines and costs, &c. No return was made to the court by the marshal, according to the exigency of the writ, and nothing further was done until the 10th day of January 1833; when the late marshal of the district made a return to each writ of capias ad satisfaciendum "cepi and delivered over to my successor in office." W. petitioned the court for a habeas corpus, asserting that he was illegally confined. The court awarded the writ; and on the return thereof, discharged the prisoner from confinement.

This court has authority to award a habeas corpus upon this state of facts. As it is the exercise of the appellate power of the court to award the writ, it is within its jurisdiction to do so. It is revising the effect of the process of the circuit court under which the prisoner is detained; and is not the exercise of original jurisdiction.

The eighth amendment to the constitution of the United States, which declares that excessive fines shall not be imposed, is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to, and a limitation upon their discretion. But this court have no appellate jurisdiction to revise the sentences of inferior courts, in criminal cases; and cannot, even if the excess of the fine was apparent on the record, reverse the sentence.

The prisoner could not be detained in jail longer than the return day of the process; and he should then have been brought into the circuit court and committed, by order of the court, to the custody of the marshal, for pay-

ment of the fine. This not having been done, by the law of Maryland, which is the law of the part of the district of Columbia in which is situated the city of Washington, he is entitled to be discharged from confinement under the process.

TOBIAS WATKINS, by Mr Brent, his counsel, presented a petition to the court, setting forth that at the term of the circuit court of the district of Columbia, holden for the county of Washington, on the first Monday of May 1829, certain presentments and indictments were found against him, upon three of which indictments trials were had and verdicts passed against him, and judgments on such verdicts respectively were pronounced by the court, purporting to condemn him to certain terms of imprisonment, and also to the payment of certain pecuniary fines and costs, for the supposed offences therein. For the nature of those proceedings the petitioner referred to the exemplifications filed in this court, with an application made to the court at January term 1830, 3 Peters's Rep. 193. The petition stated that immediately after the rendition of such judgments, and in pretended execution of the same, on the 14th day of August 1829, he, the petitioner, was committed to the common jail of the county of Washington, and there remained until the terms of imprisonment imposed by the several judgments had expired, the same having expired on the 14th day of May 1830: and that ever since that time he has been, and still is detained in the criminal apartment of the prison, under the colour and pretence of authority, not only of the judgments, but of three certain writs issued on the 16th day of February 1830, by the clerk of the circuit court of Washington county, by special orders of the district attorney of the United States for the district of Columbia, as he has been informed and believes, at the request and by direction of the president of the United States. That he is illegally detained in prison by the authority of the said writs, as he is well advised; and avers that they give no authority for his commitment and detention, having been not only illegally and oppressively issued, but he has been by them deprived of the privilege secured to him by the laws of the land, to be released from imprisonment on the ground of his insolvency, and being unable to pay his debts.

The writs gave no authority for his present detention and imprisonment, for a longer period than the first Monday in May 1830; since which time, even admitting the writs to have been legally issued, his imprisonment has been illegal and oppressive, and without any authority whatever. That the fines are excessive, and as such, contrary to the laws of the land, as he was at the time they were imposed, and ever since has been unable to pay the same, and it is not the law of the land that a citizen shall be confined for life for fines which he cannot pay. He has been refused the benefit of the insolvent laws, and if relief cannot be obtained from this court, from his inability to pay the fines he will be confined for life.

The petition "prays the benefit of the writ of habeas corpus to be directed to the marshal of the district of Columbia, in whose custody, as keeper of said jail, your petitioner is, commanding him to bring before your honours the body of your petitioner, together with the cause of his commitment, and especially commanding him to return with said writ, the record of the proceedings upon said indictments, with the judgments thereupon, and the several writs under the supposed authority of which your petitioner is now detained; and to certify whether your petitioner be not actually imprisoned and detained; as aforesaid, in a criminal apartment of said jail, by the supposed authority, and in virtue of said several writs."

The court granted a rule to show cause returnable on a subsequent day of the term.

The case was argued by Mr Brent and Mr Coxe, for the relator; and by Mr Taney, attorney-general for the United States.

Mr Justice Story delivered the opinion of the Court.

This is an application to the court to award a writ of habeas corpus to bring up the body of Tobias Watkins, a prisoner, asserted to be illegally confined in the common jail of Washington county in the district of Columbia, under process of execution issued from the circuit court of the United States for the same district. A rule was served upon the attorney-general, to show cause why the application should not be granted; and the cause has been fully argued upon the return of that

rule. It is admitted that all the facts existing in the case have been laid before the court, exactly as they would appear if the habeas corpus had been duly awarded and returned; so that the judgment which the court are called upon to pronounce, is precisely that which ought to be pronounced upon a full hearing upon the return to the writ of habeas corpus, and it has accordingly been so argued at the bar.

The material facts are as follows. Watkins was tried at the May term of the circuit court 1829, upon three several indictments found against him at that term for certain offences against the United States; and being found guilty, was upon each indictment sentenced to imprisonment for three calendar months, and to pay certain fines, to wit, on one indictment two thousand dollars, on another, seven hundred and fifty dollars, and on a third three hundred dollars, with costs of prosecution. There is no award in either of the judgments, that the prisoner stand committed until the sentence be performed. Under these sentences Watkins was immediately committed to jail by the then marshal of the district; and upon the expiration of his office, which was after the term of imprisonment was exhausted, and the appointment of a successor, he was delivered over in jail with other prisoners to his successor; and he has ever since been detained in custody. The terms of imprisonment awarded by the judgments expired on the 14th of May 1830.

On the 3d day of September 1829, the district attorney sued forth three several writs of fieri facias, to levy the aforesaid fines; upon which due return was made by the marshal of nulla bona. Upon the 16th of February 1830, the district attorney sued forth three several writs of capias ad satisfaciendum against Watkins to levy the same fines, which were all returnable to the then next May term of the circuit court. By these precepts the marshal is commanded to take Watkins, and him safely keep, so that he have his body before the circuit court on the first Monday of May then next, to satisfy unto the United States the fine, costs and charges. No return was made to the circuit court by the marshal according to the exigency of these writs; and nothing further appears upon the records and proceedings of the court until the 10th day of January 1833, when the late marshal of the district made a return

to each capias ad satisfaciendum as follows. "Cepi. Delivered over to my successor in office."

Upon this state of the facts several questions have arisen and been argued at the bar; and one, which is preliminary its nature, at the suggestion of the court. This is, whether, under the circumstances of the case, the court possess jurisdiction to award the writ. And upon full consideration we are of opinion that the court do possess jurisdiction. The question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the constitution allows this court to exercise original jurisdiction, the writ must be denied. Marbury v. Madison, 1 Cranch's Rep. 137, S. C. 1 Peters's Cond. Rep. 267. If the latter, then it may be awarded, since the judiciary act of 1789, ch. 20, sect. 14, has clearly authorized the court to issue it. This was decided in the case Ex parte Hamilton, 3 Dall. 17; Ex parte Bollman and Swartwout, 4 Cranch, 75; and Ex parte Kearney, 7 Wheat. Rep. 38. The doubt was whether, in the actual case before the court, the jurisdiction sought to be exercised was not original, since it brought into question, not the validity of the original process of capias ad satisfaciendum, but the present right of detainer of the prisoner under it. Upon further reflection, however, the doubt has been removed.

The award of the capias ad satisfaciendum must be considered as the act of the circuit court, it being judicial process, issuing under the authority of the court. The party is in custody under that process. He is then in custody, in contemplation of law, under the award of process by the court. Whether he is rightfully so, is the very question now to be decided. If the court should, upon the hearing, decide that the capias ad satisfaciendum justifies the present detainer, and should remand the prisoner, it would clearly be an exercise of appellate jurisdiction; for it would be a revision and confirmation of the act of the court below. But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it; but upon its right to hear and decide it at all. In Marbury v. Madison, 1 Cranch, 137, it was said, that it is the essential criterion of appellate jurisdiction that it

revises and corrects the proceedings in a cause already instituted; and does not create that cause.

Tried by this criterion, the case before us comes in an appellate form, for it seeks to revise the acts of the circuit court. In Ex parte Bollman and Swartwout, 4 Cranch, 75, the prisoners were in custody under an order of commitment of the circuit court; and it was held, that an award of a writ of habeas corpus by the supreme court was an exercise of appellate jurisdiction. On that occasion the court said, so far as the case of Marbury v. Madison had distinguished between original and appellate jurisdiction, that which the court is asked to exercise is clearly appellate. It is the decision of an inferior court, by which a citizen has been committed to jail. Ex parte Hamilton, 3 Dall. 17, was a commitment under a warrant by a district judge; and the supreme court awarded a writ of habeas corpus to revise the decision, and admitted the party to bail. In Ex parte Burford, 3 Cranch, 448, the prisoner was in custody under a commitment by the circuit court for want of giving a recognizance for his good behaviour, as awarded by the court. The supreme court relieved him on a writ of habeas corpus. In all these cases the issuing of the writ was treated as an exercise of appellate jurisdiction; and it could make no difference in the right of the court to entertain jurisdiction, whether the proceedings of the court below were annulled or confirmed. Considering then, as we do, that we are but revising the effect of the process awarded by the circuit court, under which the prisoner is detained, we cannot say that it is the exercise of an original jurisdiction.

The grounds principally relied on to entitle the prisoner to be discharged are: First, that the fines imposed upon him are excessive, and contrary to the eighth amendment of the constitution; which declares, that excessive fines shall not be enforced. Secondly, that the prisoner could not be detained in jail on the capias ad satisfaciendum longer than the return day of the process; and he should then have been brought into the circuit court, and committed by order of the court to the custody of the marshal for payment of the fine: otherwise by the laws of Maryland (which is the law of this part of the district), he was entitled to his discharge.

The first point may be very shortly disposed of. The

eighth amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion. But this court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence. And it may be added that if this court possessed such a jurisdiction, there is nothing on the record in this case, which establishes that at the time of passing judgment the present fines were in fact, or were shown to the circuit court to be excessive. This objection may therefore be dismissed.

The other ground is of far more importance and difficulty. At the common law, whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of capias pro fine issues against him; the exigency of which is, that his body be taken and committed to jail until the fine is paid(*a*). Unless such a committitur be awarded, he cannot be detained in jail in execution of the sentence. It is the warrant of the jailor, authorizing the detention of the prisoner. No capias ad satisfaciendum in the form appropriate to civil cases; where the exigency of the writ is to take the body of the party and him safely keep, so that the sheriff have his body before the court at the return day of the process with the writ; is ever issued or issuable. If, therefore, the present case were to be tried by the common law, the process of capias ad satisfaciendum, under which the prisoner is detained, would be wholly insufficient to justify his detention.

Let us see, then, how the case stands upon the laws of Maryland, by which, indeed, it is to be governed. The act of Maryland of the 20th of April 1777, ch. 6, which seems specially applicable to the recovery of pecuniary fines and forfeitures fixed by statute, declares, that if such fines and forfeitures shall be recovered by indictment, the court may either commit the offender to the public jail till payment to the sheriff or

(*a*) See 1 Chitty's Crim. Law, ch. 16, p. 721; Dalton's Sheriff, ch. 33, p. 159; 4 Chitty's Crim. Law, ch. 16, p. 373.

order execution to levy the same on the offender's lands, goods or chattels. This act is not supposed to have any application to the present case. The act of 20th of April 1777, ch. 13, for the more speedy and effectual recovery of common law fines and forfeited recognizances, provides, that where any fine shall be enforced by any court of record for any common law offence on any person, it shall be lawful for the attorney-general or either of his deputies to order a writ of capias ad satisfaciendum, or a writ of fieri facias, to be issued for the recovery of the sum due thereon, on which writs such proceedings shall and may be had, as in cases where similar writs are issued on judgments obtained in personal suits. It may be here stated, that writs of capias ad satisfaciendum in Maryland are the same in substance in their exigency as those prescribed in the common law. In another section of the act (sect. 4), there is a proviso that nothing therein contained shall be construed to extend to prevent the several courts, *as they might heretofore lawfully do*, from committing any person from the non-payment of any fine, if they shall deem it expedient so to do. This proviso completely establishes the antecedent practice in Maryland to have been like that at the common law, to commit the offender for payment of the fine, and leaves it at the discretion of the court to order it in any future case. By necessary implication it affirms, that without such order the offender is not detainable in jail for the fine.

Then came the act of 24th of December 1795, ch. 74; which, after reciting that doubts had arisen as to the issuing of a capias ad satisfaciendum for the recovery of fines and forfeitures, provides, that it shall be lawful for the attorney-general and his deputies ex officio, and they are hereby *directed and required on application of the sheriff of the county*, to order writs of capias ad satisfaciendum to be issued for the recovery of all fines and forfeitures. Another section of the act declares it to be the duty of the sheriffs to return the writ of capias ad satisfaciendum to the courts, to which they are returnable at the term succeeding the issuing of the same; and wherever the sheriff shall make return, that he has taken the body of the party, he shall be obliged either to acknowledge in open court the receipt of the amount of the fine or forfeiture, or to produce

the body of the party to the court, to which the said writ shall be returned; and in default thereof, the court, upon motion of the attorney-general or his deputy, shall order judgment against the sheriff for the amount of costs.

There is a prior act of the 25th of December 1789, ch. 42, which after reciting that plaintiffs are often willing to grant indulgence to defendants arrested on writs of capias ad satisfaciendum, but doubts have arisen whether such indulgence can be granted without depriving the plaintiffs of the benefits of any further execution, provides that in case of an arrest of the defendants on any capias ad satisfaciendum, if the plaintiffs *with the consent of the defendants* shall elect not to call the execution during the term, at which it is returnable, the plaintiff may afterwards proceed against the defendant by a new execution. This statute has reference to the practice then existing in Maryland, for the sheriff, upon the return day of the capias ad satisfaciendum, to produce the body of the defendant, if arrested, and for the plaintiff then to pray him to be committed. Although in its terms it applies to civil suits only; yet from its recognizing the course of practice in Maryland, it has a material bearing upon the present controversy; for the act of 1777 expressly declares that on writs of capias ad satisfaciendum for fines, such proceedings shall be had as in cases where similar suits of capias ad satisfaciendum are issued in personal suits. And, certainly, it is in entire conformity with the exigency of the writ of capias ad satisfaciendum; which commands the sheriff at the return day to bring the party, if arrested, into court. Whether the practice under the capias ad satisfaciendum in England is different, so that the party may be detained in jail by the sheriff after the return day without producing his body in court, and a committitur thereon awarded by the court, it is not material to inquire; since if there be any discrepancy, the Maryland practice must govern. The cases of Christie v. Goldsborough, 1 Harr. and M'H. 543, and West v. Hyland, 3 Harr. and John. Rep. 200; go strongly to affirm the practice: and the latter certainly leads to the conclusion, that if a party is arrested and brought into court on the return day, and is not then prayed in commitment, he is no longer to be detained in custody: at least that

case decides that a new capias ad satisfaciendum may issue against him, which presupposes, that he is not then deemed in custody upon the old one(*a*).

But the terms of the act of 1795, ch. 74 (as has been already seen), expressly require the writ of capias ad satisfaciendum for a fine to be returned into court on the return day; and the fine either acknowledged to be paid, or the body of the party produced; otherwise judgment may be entered up against the sheriff for the amount. It is clearly then his duty to produce the body. It is the very exigency of the writ; and when produced, the sheriff has performed the whole duty required by the precept. If the attorney-general wishes him to be committed, he is entitled to pray a commitment to be made by the court. If he does not pray it, it is difficult to perceive upon what ground it can be maintained, that the party is any longer to be detained in the custody of the sheriff. The latter has no power to arrest the party, or to detain him except according to the exigency of the writ; and he has discharged himself of his whole duty, when he has produced the body in court. His precept, in its terms, authorizes no detainer beyond the return day. Upon what ground, then, can the court infer it?

If resort be had to the practice, as certified to us by the clerks of the Maryland courts, it is in perfect coincidence with the natural construction of the terms of the act. They assert the uniform practice upon writs of capias ad satisfaciendum in criminal cases to be, to bring the party into court, and then to award a committitur. No instance is shown in which a party has ever been held in custody after the return term, upon such a capias ad satisfaciendum, without a committitur. Such a uniform course of practice, is of itself very cogent evidence of the law. The practice in this district is not shown to be different. If it has not invariably conformed to that of Maryland, it seems to have conformed to it in almost all cases. The only two cases produced to the contrary, are where the return was "cepi in jail;" and the circumstances of these particular cases

(*a*) See also Evans's Harris's Entr. vol. 2d, p. 313, No. 40; Fulton v. Wood, 3 Harr. and M'H. Rep. 99; Dyer v. Beatty, 3 Harr. and M'H. Rep. 219

are unknown. The parties may have been already in jail on execution, or under other sentences.

And independent of the plain import of the writ of capias ad satisfaciendum, there may be sound reasons for requiring the body to be produced in court. The capias ad satisfaciendum may have issued irregularly; the party may have paid the fine; he may have received a pardon subsequently to its award; or he may have other matters to urge against a commitment. The remark of the court in Turner v. Walker, 3 Gill. and Johns. Rep. 377, 385, upon an analogous writ, is very applicable here. "It is proper and necessary," say the court, "to the security of the defendant, that it should be returned in term time, in order that he may have a day in court to protect his rights." Indeed, as the statute and the precept of the process both require this course, it is incumbent upon those who contend that it may be dispensed with, or is unnecessary, to show some ground of authority or principle upon which the argument can be maintained. We have not been able to find any.

It has been said, that where the party convicted is already in custody when the sentence is passed, the party is to be deemed in custody until the fine is paid, without any award of a commitment in the sentence, or the issuing of any capias ad satisfaciendum. We know of no authority justifying this position, either at the common law or under the laws of Maryland. On the contrary, the act of Maryland of 1777, ch. 13, plainly allows a discretion in the court to commit or not to commit, for the fine. The omission to award a commitment, as a part of the sentence, is manifestly an exercise of such a discretion. Unless a committitur be awarded, which can only be when the party is in court(*a*), there must, as has been seen, be a capias pro fine by the common law, and by the laws of Maryland a capias ad satisfaciendum, to justify his arrest and detention.

The capias ad satisfaciendum then, in this case, was properly awarded. It was a necessary process to recover the fine. The difficulty is, that no return was ever made to the court at the return day by the marshal, nor indeed until long after the

(*a*) See 1 Chitty's Criminal Law, 695, 696.

marshal's office had expired. Watkins was never brought into court, nor committed by the order of the court. He is now held in jail, and has, ever since the return term, been held in jail solely upon the capias ad satisfaciendum, which became functus officio after the return day. He might have been arrested and detained in jail, if he had not been previously in custody, until the return day; but his detention afterwards, was not, in our judgment, justified by the process. In every view which we have been enabled to take of the case, we cannot find any principle or authority to justify his detention. Doubtless the detention has been in entire good faith, under a mistake of the law. But this cannot vary the results.

We are accordingly of opinion that the writ of habeas corpus ought to issue, as prayed for.

Mr Justice JOHNSON dissenting.

This case presents two questions, one of jurisdiction; and the other on the right to relief, if we assume jurisdiction.

My opinion on the first has been so strong in the negative, that I have taken little pains to investigate the second; but I will give a brief exposition of my views on both.

On the first I have thought that it need but be stated to be decided.

The prisoner is in custody of a capias ad satisfaciendum issuing out of the circuit court of this district. He has been convicted of a crime, a fine has been inflicted, and this writ has been issued to recover it, as he was not required by the sentence to remain in custody until the fine was paid. It is not questioned that the process was legally issued conformably to the laws of Maryland, or contended that any ground whatever exists for discharging the prisoner; except first, the excessive character of the fine, which ground this court has now decided against; and secondly, that upon which he is now to be discharged, to wit, that he was not on the return day of the writ brought into court, and there formally recommitted to the marshal, to be detained until the fine was paid.

Now it does appear to me that it is impossible to avoid being trussed on one horn or the other of the dilemma, with which the case was met by the attorney-general. Is this court called upon to relieve the prisoner against an act of the court, or an act of

the officers of the court? If of the court, then what act has the court done, or omitted to do, to the prejudice of the defendant? The cause of complaint is, that it has not committed him to the custody of the marshal; but the custody of the marshal is the very injury that we are now called upon to redress. Is the omission to do that which, by the terms of this application it is acknowledged, would have legally and effectually deprived him of his liberty, a matter for him to complain of? or for us to relieve him from? But suppose it is a cause of complaint that the court has erred in not doing an act which it was never called upon to do; then have they not erred in a criminal cause? And is it not therefore acknowledged to be beyond the limits of our appellate jurisdiction?

But the truth is, and it is impossible to controvert it, that the complaint is, and the relief sought is, against the marshal for a detention without authority. The court committed no error in issuing the process, under which the arrest was made; and if, as is now established, the process has lost its efficiency, and is no longer a justification for detaining the prisoner; it is not *under* the process of the court that he is detained, but *without it*, and therefore false imprisonment in the officer. Why did not the prisoner present this motion to the court that issued the process? to the court whose officer the marshal is, quoad hoc? The reason is obvious; had the court refused to discharge him, and this application then been made here, the appeal would have been too palpably in a case of criminal jurisdiction. And yet, in that event only, would he have found a pretext for claiming of *this court* redress against an act of *that court*. At present there is no act of that court for this court to revise; for if not giving the order for commitment could be tortured into such an act, then the answer is, there never was a motion made to grant such an order: and if holding him in custody under process, or pretext of process, issuing out of that court, can be considered as a subject of revision here; then is the court unaffected by the error, since, in terms, the motion here admits their process to have long since expired in the marshal's hands: and surely the court is not responsible for any thing done under colour of its process, but for which the process gives no authority.

The truth is, that this is a direct interference by means of

the writ now moved for, between a court of the United States, and the executive officer of that court: and upon the principles of this decision, I see no reason why we may not next be called upon to issue the same writ to our Ultima Thule, the mouth of the Oregon, to bring up a prisoner under a capias ad satisfaciendum, in order to examine whether he has paid the debt or not. Is this appellate jurisdiction; or is it the proper employment of this tribunal?

This all grows out of the case of Hamilton; a case on which the question was not decided, and a case which, if any one will examine the report of it, he will pronounce of very little authority. Then followed the case of Bollman v. Swartwout, professing obedience to that of Hamilton; but a case which occurred in the midst of great public excitement. Next came those of Burford and Kearney, et similes multi; and finally this, which is a distinct augury in my humble opinion of the conclusions to which we are finally to be led by precedent. I have always opposed the progress of this exercise of jurisdiction, and will oppose it as long as a hope remains to arrest it.

On the second point, I will make but a few remarks.

I have never doubted that under the writ of capias ad satisfaciendum, by the common law, the sheriff may not only take, but detain the defendant until he was legally discharged; or that for the purpose of authorizing a detention in his own custody, a commitment to the sheriff was unheard of. On the page of the book quoted by defendant's counsel to maintain the contrary doctrine, which precedes the page quoted, will be found, an entry, that explains in what cases the committitur is resorted to in England. It is true that this writ has its return day; and that it, in terms, requires the production of the defendant's body on that day: but practically, this exigency of the writ has received this construction; "that he have him ready to produce on that day, if so required by the plaintiff." Blackstone says, vol. 3, p. 415, "if he does not on that day make satisfaction, he must remain in custody until he does." And in the case of Hopkins v. Plomer, 2 Black. 1048, the court gives in express terms, that version to the writ. "It is the sheriff's duty, say the court, to obey the writ, and the writ commands him to take the defendant, and him safely keep, so that he may have him *ready to satisfy the plaintiff*. What figure

would a sheriff make in England, if to an action for escape, he were to plead that he took the defendant and brought him into court on the day, &c., in the literal language of the exigency of the writ? No one would dream of justifying his not detaining the prisoner, for want of a committitur. But it is insisted that the common law has undergone a change under the laws and practice of Maryland.

I have seen no statute of Maryland which, either in terms or by inference, makes a committitur to himself necessary to justify a sheriff in detaining his prisoner under a capias ad satisfaciendum. It is true that, by a very humane and judicious provision, the laws of Maryland have permitted the plaintiff to indulge the defendant in execution without losing his debt; and from this the practice might naturally grow up to bring the defendant into court to await the will of the plaintiff: and the court have very properly decided, omitting the motion to remand him, did not deprive the plaintiff of his second execution: but I look in vain for any decision going to establish that the sheriff would have been liable for false imprisonment, had he taken the prisoner back to jail without a commitment.

This has been sought to be supplied by a reference to the clerks of the Maryland courts to establish a practice to that effect; but I protest against such means of getting at the law of a case, especially as to a practice of which those clerks are called to testify subsequent in date to the separation from Maryland. But I have looked into the evidence thus procured, and, even if legal, I look in vain for any evidence to support the doctrine; most of them speak doubtingly, or decline speaking at all, and the sum and substance of the certificates of the whole amount to no more than this, that if the sheriff brings the body into court, the court will, on motion, order a commitment. But this is not the point we are called upon to decide: we are called upon to decide that, without such commitment, it would be false imprisonment in the sheriff to resume the custody of the defendant. In this district, I think there has been positive evidence furnished by the defendant himself of the exercise of a discretion in the marshal, whether to bring the person of the prisoner into court or not; and therein perhaps to consult the feelings of the individual. I allude to those two instances in which the return was "cepi and defend-

ant in jail." We may imagine some possible ground for lessening the pressure of these two instances; but certainly the case, as exhibited to us, furnishes no such ground.

I am opposed to the order now made.

Mr Justice M'Lean dissented, on the ground that where a defendant had been committed by the marshal on a capias ad satisfaciendum, before the return day of the writ, it is not the practice either in this district or in the state of Maryland, as he understood it, to bring up the defendant, that he may be prayed in commitment: but that it is the practice, under the construction of the Maryland law, where a defendant has been arrested on a capias ad satisfaciendum, and permitted to go at large until the return day of the writ, to bring his body into court on such day, that it may be prayed in commitment.

On consideration of the petition filed in this case in behalf of the petitioner, and of the arguments of counsel as well for the United States as for the petitioner thereupon had, it is the opinion of this court that the writ of habeas corpus ought to issue as prayed for. Whereupon, it is considered, ordered and adjudged by this court, that a writ of habeas corpus be forthwith issued, directed to the marshal of the United States for the district of Columbia, commanding him to have the body of the said Tobias, with the day and cause of his caption and detention, immediately after the receipt of the writ, to do, receive and submit to all and singular those things which the court shall consider concerning him in this behalf, and to have then and there the said writ with his doings thereon.

To the writ of habeas corpus the marshal of the district of Columbia made the following return:

Henry Ashton, Esq. marshal of the United States for the district of Columbia, having read in open court and filed the following writ, together with his return thereon, viz. "United States of America, ss. The president of the United States, to the marshal of the United States for the district of Columbia, greeting: You are hereby commanded that you have the body of Tobias Watkins, detained under your custody, as it is

said, under a safe and secure conduct, together with the day and cause of his caption and detention, by whatsoever name he shall be called in the same, before the supreme court of the United States, now sitting in the capitol of the United States in the city of Washington, being the present seat of the national government, immediately after the receipt of this writ, to do, receive and submit to all and singular those things which the said supreme court shall then and there consider concerning him in this behalf, and have then and there this writ with your doings thereon. Witness, &c.

Return of the marshal. "To the honourable the judges of the supreme court of the United States. The marshal of the district of Columbia, in obedience to the writ of habeas corpus issued by the authority of your honours, now produces into your honourable court the body of Tobias Watkins, who has been in his custody ever since he came into office, delivered over to him by his predecessor, Tench Ringgold, in jail; he stating that he had been held in his custody by virtue of three writs of capias ad satisfaciendum at the suit of the United States, and by virtue of a writ of capias ad respondendum, at the suit of one William Cox, upon which said last mentioned writ he the said Watkins had been prayed into commitment by the said Cox, and had been ordered into commitment by the honourable judges of the circuit court of the United States for the district of Columbia, sitting for Washington county, by whose authority all the said writs had been issued. That being satisfied of the correctness of the representations of his said predecessor, he continued to detain the said Watkins in custody without any complaint or allegation of any illegality or wrong in the said confinement until the rule was moved for in your honourable court, at its present term, at the instance of said Watkins, for cause to be shown by the attorney-general of the United States why a writ of habeas corpus should not be granted to bring the said Watkins before your honours, together with the cause of his detention. He further shows to your honours, that since the said rule was moved for, the writ of Cox, as aforesaid, has been dismissed; and from that time to the time of his receiving the said writ of habeas corpus, he held him in custody by virtue only of the three writs of capias ad satisfaciendum at the suit of the United States, considering it improper to discharge him

pending the deliberations of your honours upon the legality or illegality of his detention under and by virtue of those writs last mentioned."

On consideration whereof, and after due deliberation thereupon had, it is now here considered, ordered and adjudged by this court, in this behalf, that the said prisoner, Tobias Watkins, be, and he is hereby discharged from confinement under the said several three writs of capias ad satisfaciendum at the suit of the United States, in the said return of the marshal mentioned.

After the discharge of Mr Watkins, by this order of the court, on the 19th day of February 1833, he was, on the same day, arrested and confined by the marshal of the district of Columbia, under three several writs of capias ad satisfaciendum issued on the same judgments, under which he had been previously detained in prison. These writs were dated on the 19th of February 1833, and were issued by order of the district attorney of the United States for the district of Columbia; and were returnable at the next term of the circuit court of the district.

A petition for a writ of habeas corpus, setting forth this arrest and his imprisonment under it, was presented by Mr Watkins; and a rule on the attorney-general was, on motion, granted, to show cause why the same should not issue.

After argument of this rule, by Mr Coxe and Mr Brent, for the relator; and by Mr Taney, the attorney-general of the United States, and Mr Key, the attorney of the United States for the district of Columbia; the rule was discharged: "the court being equally divided in opinion as to the question whether this court ought to award a writ of habeas corpus, as prayed in the case by the petitioner" (*a*).

(*a*) At the March term 1833 of the circuit court of the United States for the county of Washington in the district of Columbia, Mr Watkins was brought up on a writ of habeas corpus awarded by that court, and was discharged. The very learned opinion of the court, delivered by the chief justice of the circuit court, will be found in the appendix to this volume.

JOSHUA SCHOLEFIELD AND JOHN TAYLOR, PLAINTIFFS IN ERROR v. JESSE EICHELBERGER, SURVIVING PARTNER OF JOHN CLEMM, DEFENDANT IN ERROR.

Action of assumpsit to recover the balance of an account current for merchandize purchased in England by order of the defendants. The defence was, that the contract was made during the war, and therefore void. By the court: the doctrine is not to be questioned at this day, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other.

To say that this rule is without exception, would be assuming too great latitude. The question has never yet been examined whether a contract for necessaries, or even for money to enable the individual to get home, could not be enforced; and analogies familiar to the law, as well as the influence of the general rule, in international law, that the severities of war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But at present, it may be safely affirmed that there is no recognized exception, but permission of a state to its own citizens; which is also implied in any treaty stipulation to that effect, entered into with a belligerent.

There is no doubt that the liability of a deceased co-partner, as well as his interest in the profits of a concern, may, by contract, be extended beyond his death; but without such a stipulation, even in the case of a co-partnership for a term of years, it is clear that death dissolves the concern.

IN error to the circuit court of the United States for the district of Maryland.

In the circuit court, an action of assumpsit was brought by the plaintiffs in error for the recovery of one thousand and one pounds four shillings and eight pence sterling, with interest; asserted to be due to them by the defendants in error, for merchandize sold and delivered. The declaration was in the usual form.

On the trial of the cause, the plaintiffs, to maintain the issue on their part, offered in evidence two accounts headed as follows: "Dr. Messrs Eichelberger and Clemm in account with Scholefield, Redfern and Co."

In these accounts, the first of which commences on the 20th of July 1813, the defendants are charged on that day, and at subsequent dates, with sums as due for goods, postages, expenses and interest; and are credited with several payments

in 1814, 1815, 1816 and 1817: the balance stated to be due to the plaintiffs on this account, on the 1st of January 1818, appears to be two thousand five hundred and seventy-nine pounds, sixteen shillings. The second account commences January 1, 1818, and contains a credit of eight thousand dollars under date of February 14, 1819; leaving the balance of one thousand and one pounds four shillings and eight pence due on the 1st day of July 1819, the sum for which the action was instituted.

The plaintiffs proved that these accounts were delivered to the defendants for settlement some time in 1819, and that no objections were made to them, and the defendant acknowledged the balance of the accounts to be due, and promised payment of the same.

It was also in evidence, that the plaintiffs were British subjects and merchants, and had been such since the year 1807, and had always resided in England.

The defendant, to support the issue on his part, offered in evidence the correspondence of the late firm of Eichelberger and Clemm, and J. and W. Eichelberger with the plaintiffs, commencing on the 2d of February 1813, and terminating on the 20th of May 1816. The letter of 2d February 1813, from the defendants' late firm, received by the plaintiffs in error on the 17th June 1813, after stating to the plaintiffs that every thing indicated a determination on the part of the government of the United States to continue the war then existing with England, proceeds to say:

"As such a conviction may reduce the prices of your manufactures considerably, we have prepared an order (which is hereto annexed) for some articles which *are* only *to be purchased* in the event of such a reduction. You will perceive that the investment of our money in this way is an uncertain speculation, whatever may be the reduction of prices, for we can form no opinion as to the time when they can be imported into this country; and you will therefore insure the goods, when bought, against fires. So soon as we are favoured with the invoice, we will transmit a bill of exchange for the amount. This you may calculate on with certainty."

The subsequent letters of the 13th April 1813, and of the 18th June 1814, contain further orders for the purchase of

goods; and by that of the 18th June remittances were made, and expectations of peace are expressed. "Should this desirable event take place," the defendants say, "we shall calculate on receiving the goods amongst the first that arrive, under full insurance against sea risk."

By a letter of the 22d February 1815, the firm of Eichelberger and Clemm communicated the ratification of the treaty of peace, express their expectations of uninterrupted correspondence with the plaintiffs; and they also say, "the principal object of this letter is, to confirm our former orders, and to assure you that immediate arrangements will be made to remit largely on account of them, with a full reliance that they have been executed on the most favourable terms, and with the largest discount."

On the 20th of May 1816, they communicated to the plaintiffs the losses which they have sustained, and their expectations of greater losses by the goods which had been purchased for them during the war not having been sent out in the spring of 1815, and they offer to return to the agent of the plaintiffs the packages of those goods which remain unsold. They say, in that letter, "We are anxious to make you payment;" and they ask that the plaintiffs may be satisfied with the interest on the balance due to them, as the same may be afterwards remitted on more advantageous terms than at that date, in consequence of the high rate of exchange.

The correspondence of the plaintiffs with Eichelberger and Clemm, from the 9th of August 1813 to the 13th of August 1816, was also given in evidence to show the periods in which the transactions between the parties were carried on.

The invoices of the merchandizes shipped by the plaintiffs to the defendants' late firm, were headed in the following terms:

"*Birmingham, August* 20, 1814.

"Invoice of sundry merchandizes bought of Scholefield, Redfern and Co. on account and risk of Messrs Eichelberger and Clemm, of Baltimore, marked and numbered as follows, and consigned to care of Messrs Hughes and Duncan, Liverpool."

"*Birmingham, March* 10, 1815.

"Invoice of sundry merchandize bought by Scholefield,

Redfern and Co. on account and risk of Messrs Eichelberger and Clemm, of Baltimore, citizens of the United States of America, marked and numbered as follows, and consigned to the care of Messrs Hughes and Duncan, Liverpool."

The defendants also gave in evidence the deposition of William Eichelberger, which stated, "That sometime in the spring or summer of the year 1815, the exact period deponent does not recollect, he, this deponent, associated in the hardware business with his brother Jesse Eichelberger, who had previously conducted the same business in company with his brother-in-law, the late Mr John Clemm: That sometime in the autumn of the said year 1815, goods and merchandize arrived in the port of Baltimore from England, which goods and merchandize, this deponent entered at the custom house for Jesse and William Eichelberger: the said Jesse at the time of the arrival of the said goods being absent from the city on an excursion to the country: That the said goods and merchandize were the first that had been received since the death of Mr Clemm, and that the said goods and merchandize were entered in the books of Jesse and William Eichelberger, as their own goods, and were not at any time afterwards considered or disposed of as the goods of Eichelberger and Clemm. This deponent further saith, that all the goods and merchandize which were received subsequently to the death of Mr Clemm, were disposed of as if all the orders in relation to them had been given by Jesse and William Eichelberger, and that no part or portion of the proceeds of said goods and merchandize ever went to the credit of Eichelberger and Clemm, or to the individual estate of Mr Clemm."

The plaintiffs also gave in evidence, by John S. Skinner, that packets sailed, as cartels, between America and England frequently during the war: That cartels for a time sailed from Annapolis to Falmouth, in England—and that witness was appointed by the president of the United States to superintend the said cartels, and did superintend them from December 1812, until they ceased to run from Annapolis, which happened in about a year after the time abovementioned.

A multitude of letters on commercial subjects were sent by the said cartels—that all letters sent by them were examined

by the witness; that he never detained any letters on commercial subjects merely, but all letters of that description were suffered to go without interruption—that the practice of witness, as above stated, was known to the secretary of state, and approved by him.

Upon which evidence the defendant, by his counsel, prayed the court to instruct the jury, that upon the whole evidence, the contract upon which this action is founded, is utterly void, upon principles of public policy, and that the plaintiffs were not entitled to recover. Which instruction the court accordingly gave.

The plaintiffs excepted to the charge of the court, and prosecuted this writ of error.

The case was argued by Mr Donaldson and Mr Taney, for the plaintiffs in error; for the defendant, a printed argument was submitted to the court by Mr R. Johnson and Mr R. B. Magruder.

For the plaintiffs in error it was contended, that the contract, as set forth in the bill of exceptions, was a valid contract, on which the plaintiffs were entitled to recover; and that the court below erred in instructing the jury on the prayer of the defendant, that said contract was utterly void upon principles of public policy.

It was argued that the facts of the case do not bring the contract within the principle upon which the court charged the jury, against the plaintiffs; and which is insisted upon by the counsel for the defendants in error.

2. The intercourse between the parties was under the view and permission of the government of the United States, was not contrary to public policy, nor was it such as was inconsistent with the actual hostilities then existing between the two nations.

The rule that there shall be no trading with the enemy, is admitted; but this rule is applicable only to contracts made, and to be executed and completed during a war. While such contracts are acknowledged to be forbidden and to be void, a contract like that upon which this suit was founded partakes of no features which can bring it into censure. There was no

intention to bring the goods into the United States until peace should be re-established: the goods were ordered to be purchased with this view and with no other, and they were to remain in England waiting that event. The expected demand for the goods on the return of peace furnished the only inducement to their purchase.

The evidence in the case shows that the first invoice, comprehending a part of the goods purchased, was paid for. The second invoice, dated March 10th, 1815, was after the war was ended, and was legal.

If the contract in the first invoice was illegal, it was closed and paid for. The debt due upon the second invoice was acknowledged after the war; and payment of it was promised.

If there was any intention to trade with the enemy, it was not carried into effect; an intention to trade with the enemy, and at the time when the trading is actually carried on, peace exists, no offence is committed. The Saunders, 2 Gallison, 210, 214. The principles of that case fully apply to the case before the court. The trading which was condemned by the court of New York in the case of Griswold v. Waddington, 16 Johns. 438, was a trading during the war. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed, 8 Cranch, 163.

The evidence in this case shows that commercial letters were allowed by the government to be transmitted to England. That commercial letters were transmitted under the inspection of the government agent, and this was known to, and approved by the president. This practice was known to exist by the secretary of state, and was approved. This was equivalent to a license. If certain acts are permitted, their incidents are legalized. 8 East, 273, 290; 5 Taunton, 679; Eng. Com. Law Reports, 231. A citizen of the United States may during war draw bills on the subjects of an enemy. 1 Paine, 166.

For the defendant in error it was argued, that the judgment of the circuit court should be affirmed on the following grounds.

1. The contract upon which the suit is brought, having been made at a time when Great Britain and the United States of America were at open war with each other, and the plaintiffs and defendants in this cause being then respectively citizens of

the two belligerent nations, is utterly void on principles of public policy, acknowledged by all the civilized communities of the world. It would be a waste of time to multiply authorities for so clear a proposition. The whole subject is fully discussed in the case of Griswold v. Waddington, reported in 16 Johns. Rep. 438, and the authorities there cited by the chancellor; who, in page 472, reviews the American decisions.

2. If the orders for goods given by Eichelberger and Clemm, during the war, never afforded a ground of action for the plaintiffs against them, then it is conceived that the present suit cannot possibly be sustained. It is, in form, a suit against Jesse Eichelberger as surviving partner of John Clemm; and cannot be supported by any evidence of a *subsequent* reception of the goods, and a promise to pay by Eichelberger *after* the dissolution of the partnership by the death of Mr Clemm. The goods having been received by J. and W. Eichelberger, and a promise made to pay for them, it may possibly be true that J. and W. Eichelberger were responsible for them; but the suit should have been brought against them, and not in its present form, which supposes an ultimate liability of the representatives of Mr Clemm, who was never himself liable, and whose estate never was in point of fact benefited by the goods furnished by the plaintiffs. The attention of the court is particularly called to the form of the present action; which it is confidently conceived cannot be sustained, unless the contract, in its inception, was valid and obligatory upon Eichelberger and Clemm. There can be no relation back, from the subsequent reception of the goods, to make the estate of Clemm in any event liable. Any right of action, if existing at all, could only have sprung up from the subsequent receipt and appropriation of the goods, and this was by the new firm of J. and W. Eichelberger, and long after the dissolution of the partnership of Eichelberger and Clemm.

Mr Justice JOHNSON delivered the opinion of the Court.

The action here is assumpsit to recover the balance of an account current against Eichelberger, survivor of Eichelberger and Clemm, the latter having died during the war. The defence is, that the contract was made during war, and therefore void.

The doctrine is not at this day to be questioned, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other. For near twenty years this has been acknowledged as the settled doctrine of this court, and in a case which proves it to be a rule of very general and rigid application (The Rapid). Even the exception commonly quoted of ransom bonds, has been shown, I think, in the case of Potts v. Bell, to be no exception; since it grows out of a state of war; is, ex vi termini, a contract between belligerents; and from its nature carries with it the evidence of the fidelity of the parties to their respective governments. To say that the rule is without exception, would be assuming too great a latitude. The question has never yet been examined, whether a contract for necessaries, or even for money to enable the individual to get home, would not be enforced; and analogies familiar to the law as well as the influence of the general rule in international law, that the severities of war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But at present, it may be safely affirmed that there is no recognized exception but permission of a state to its own citizen, which is also implied in any treaty stipulation to that effect entered into by the belligerents.

Nor do the learned gentlemen who argued this cause controvert the general rule; they only attempt to except this case from its application: First, by an imputed permission on behalf of the United States; Second, by shifting the creation of the contract from the date, which appears on its face, to the time of delivery of the goods; which, in point of time, were not shipped until after the peace.

On the first of these grounds of exception there is a very strong case on record, to show that such a relaxation of the laws of war is not to be inferred from ordinary circumstances, if indeed it may be inferred at all; it is the case of the Count de Wohrenzoff, decided by the lords of appeal, in the year 1781. It was the case of an importation of French wines from Bourdeaux into Ireland, during the war of our revolution, and the evidence to justify it was, that the trade in wines between Dublin and Bourdeaux had been going on from the commencement of the war, openly and without interruption from the officers of the customs; nay, that an additional duty had been imposed

upon their importation since the commencement of the war. Yet they were condemned, and their condemnation affirmed. These circumstances are infinitely stronger than those relied on in this case; since the permit to carry on commercial correspondence during the war, cannot reasonably imply more than to sanction an innocent correspondence; a correspondence leading only to legal results, not having for its objects any unpermitted acts, or acts inconsistent with the relation of members of hostile states.

It will be perceived here that the court does not deny the power of belligerent states, so to modify the relations of a state of war as to permit commercial intercourse or other intercourse according to their will. They who give the law may modify it, and except from its operation whatever ground they choose to declare neutral. The language of jurists is uniform on this subject, and reason, policy and humanity, sustain the exercise of such a power.

The second ground of exception relied on by the plaintiffs, suggests several considerations.

It is insisted, that the goods having been shipped subsequent to the war, and coming to possession of the survivor of Eichelberger and Clemm, constituted a sufficient ground of contract, without reference to the time of purchase, the delivery raising the contract for payment, and the receipt by the survivor being the receipt of the firm to which it was shipped.

1. Had the articles of copartnership, or the terms of it, if entered into without written articles, appeared upon the bill of exceptions, the court would have been called upon to consider this exception, with reference to the terms of those articles. There is no doubt that the liability of a deceased copartner, as well as his interest in the profit of a concern, may by contract be extended beyond his death; but without such stipulation, even in case of a copartnership for a term of years, 3 Madd. 245: it is clear that death dissolves the concern. In the absence of proof to the contrary, we can only take this as the case of a general association, without articles extending it beyond the life of Clemm, and then the shipment having been made after his death, and no part of the proceeds having ever come to his use, the case furnishes no ground for charging his estate.

2. But this is not the true ground on which to place this question. The consideration fatal to the claim of the plaintiffs, that the letter on which these advances were made, was in itself a nullity, and could not be made the basis of a contract, on which this court would entertain a suit; the purchases made under it could add nothing to its validity, nor were these goods ever the property of these plaintiffs, for they were purchased for these defendants, and finally shipped to them as their goods, not those of the plaintiffs. The plaintiffs advanced the money; with them the contract was for money paid and expended, but in the purchase and sale of the goods they were but the agents, carrying into effect a contract between the seller and these defendants. Hence the insurance against fire, No. 1, for the loss would have been that of defendants, not of plaintiffs.

These considerations leave no doubt upon the mind of this court, that the decision of the court below was correct.

The judgment is affirmed.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs.

Richard M. Scott, plaintiff in error v. Ezra Lunt's Administrator.

Action of covenant brought by the plaintiff in error to recover the amount of certain rents alleged to have been due and in arrear from the defendant since the death of his intestate under an indenture, by which a certain annual rent was reserved out of the property conveyed by the indenture, and which the grantee covenanted to pay; a clause of re-entry for non-payment of the rent being contained in the deed. By the court: it is firmly established, that on a covenant to pay rent, reserved by the deed granting real estate subject to the rent, the personal representatives of the covenantor are liable for the non-payment of the rent, after an assignment, although there may also be a good remedy against the assignee. The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law in England.

The assignee of a fee farm rent, being an estate of inheritance, is, upon the principles of the common law, entitled to sue therefor in his own name. It is an exception from the general rule, that choses in action cannot be transferred, and stands upon the ground of being, not a mere personal debt, but a perdurable inheritance.

The common law of England, and all the statutes of parliament made in aid of the common law, prior to the fourth year of the reign of king James the first, which are of a general nature, and not local to the kingdom, were expressly adopted by the Virginia statute of 1776; and the subsequent revisions of its code have confirmed the general doctrine on this particular subject.

The instructions given to the jury, not conforming to the issue made up by the pleadings, a venire de novo was awarded.

IN error to the circuit court of the United States for the county of Alexandria in the district of Columbia.

This was an action of covenant instituted in the circuit court for the county of Alexandria, by the plaintiff against the defendant, to recover sundry annual rents alleged to be due from the defendant's testator to the plaintiff, under a deed executed by General George Washington and wife of the one part, and the defendant's intestate on the other part, by which a lot of ground in the city of Alexandria was conveyed to Ezra Lunt, his heirs and assigns, subject to the payment of an annual rent of seventy-three dollars, payable to General George Washington, his heirs, executors and assigns, on the 8th day

of August in each year. The deed was made upon the 8th day of August 1799, and contained the following covenants:

"And the said Ezra Lunt, his heirs and assigns, does hereby grant unto General George Washington, his heirs and assigns, the said annual rent of seventy-three dollars, issuing out of the said hereby demised premises; and the said Ezra Lunt, his heirs and assigns, do hereby covenant, promise and grant, to and with the said General George Washington, his heirs and assigns, that he, the said Ezra Lunt, his heirs and assigns, will yearly, and every year for ever, well and truly pay the aforesaid sum of seventy-three dollars, unto the said General George Washington, his heirs and assigns, on the day and at the time appointed for payment, as aforesaid; and also, that it shall and may be lawful for the said General George Washington, his heirs and assigns, at any and at all times after the said rent shall become due (if the same be not paid when demanded), to enter upon the said hereby granted piece of land, and distress and sale make of the goods and chattels which may be thereupon found, to pay and satisfy such rent or rents, or part of a rent, as may remain due and in arrear. And it is further agreed, covenanted, conditioned and provided, by the said Ezra Lunt, his heirs and assigns, to and with the said General George Washington, his heirs and assigns, that if the said yearly rent of seventy-three dollars, or any part thereof, be behind or unpaid for the space of thirty days next after the same became due and payable, and sufficient goods and chattels of the said Ezra Lunt, his heirs and assigns, shall not be found upon the said hereby granted premises to pay and satisfy the same, that then it shall and may be lawful for the said General George Washington, his heirs and assigns, in and upon the said hereby granted piece of land and premises to re-enter, and the same to hold again, repossess and enjoy, as if this present indenture had never been made, any thing herein contained to the contrary thereof in anywise notwithstanding."

The deed also contains a covenant of general warranty.

On the 28th of August 1804, the executors of General Washington, by a deed of indenture executed on that day, sold and conveyed to Henry Smith Turner, his executors, administrators and assigns, the annual rent of seventy-three dollars, issuing out of, and charged upon the piece of ground conveyed

to Ezra Lunt, "to have and to hold the said annual rent of seventy-three dollars, unto the said Henry Smith Turner, his heirs and assigns," &c. This deed recited the conveyance to Ezra Lunt at large.

On the 25th day of February 1808, Henry Smith Turner sold and conveyed the said ground rent of seventy-three dollars, to the plaintiff in error. The conveyance, after reciting the deed from General Washington to Ezra Lunt, and that the said rent and the powers of distress and re-entry contained in the same, were, by the executors of General Washington, transferred to him, the said Henry Smith Turner, his heirs and assigns, by the deed of August 5th, 1804, proceeds as follows:

"Now this indenture witnesseth, that the said Henry Smith Turner, and Catharine his wife, for and in consideration of six hundred dollars, to him, the said Henry S. Turner, in hand paid by the said Richard Marshall Scott, at or before the sealing and delivery of these presents, the receipt whereof he, the said Henry Smith Turner, doth hereby acknowledge, and thereof and of every part and parcel thereof doth acquit, release, and discharge him, the said Richard Marshall Scott, his heirs, executors and administrators, by these presents, have given, granted, bargained, sold, aliened, assigned, transferred, set over, and confirmed, and by these presents do give, grant, bargain, sell, alien, assign, transfer, set over, and confirm unto him, the said Richard Marshall Scott, his heirs and assigns for ever, that rent of seventy-three dollars, issuing out of that piece of ground lying upon the north side of Prince street, and to the westward of Pitt street, in the town of Alexandria, granted by the said George Washington to the said Ezra Lunt, and by his executors conveyed and transferred unto him, the said Henry Smith Turner, and the powers of distress and re-entry, and all deeds and instruments of writing which relate to the reservation and transfer of the said rent, and every covenant, clause, and stipulation, contained in them or any of them. To have and to hold all and singular the said premises, with their appurtenances, unto him, the said Richard Marshall Scott, his heirs and assigns, to the only proper use and behoof of him, the said Richard Marshall Scott, his heirs and assigns for ever."

To the declaration filed upon the covenant contained in the lease for the payment of these rents, the defendant pleaded:

1st, That he had not broken the covenants in the declaration mentioned, and put himself on the country and the said plaintiff likewise. The defendant afterwards filed a general demurrer to the declaration, which was overruled by the court, and the defendant then filed two additional pleas, viz:

2d, That he had fully administered, &c.

3d, That before the days in the declaration mentioned for the payment of said rent, that is to say, on the —— day of ——, in the year —— the said plaintiff, under and by virtue of the said condition of re-entry in the said deed contained, did enter on the said premises, thereby demised, for non-payment of certain rent then in arrear and unpaid, and held and occupied the same as vested in him by the said entry as his absolute estate, &c.

To these pleas there was a general replication and issues.

After these issues were joined, the plea fully administered was withdrawn, and the cause went before the jury upon the first and second pleas above stated.

The plaintiff gave in evidence the deed or lease from General Washington and Martha his wife, to Ezra Lunt, and the conveyances of the executors of General Washington, and Henry Smith Turner.

The defendant then gave evidence to prove that, upon the settlement of the administration account by the defendant upon the estate of his testator, there was a balance in the hands of the administrator of one hundred and forty-nine dollars; which he, the defendant, under the order of the orphans' court, distributed among the next of kin of the deceased, in the year 1812; no demand having been made upon him as administrator for said rent previously to this suit.

The defendant then gave, in evidence to the jury, a deed from the original lessee, Ezra Lunt and his wife, to James Boyd, and a deed from James Boyd to Jonathan Schofield, by which deeds it was admitted, that the premises upon which the said rent was charged had been duly conveyed to him, Jonathan Schofield.

The defendant then offered Jonathan Schofield as a wit-

ness in the said cause to prove that the said plaintiff had made a re-entry upon the premises in question.

The said Schofield proved, that he had held the premises in question, from the time he obtained a deed for them, that is to say, from the 4th of November 1817, to the latter end of the year 1820; that towards the close of 1820, the plaintiff pressed him for the rents then due upon the premises, and threatened to re-enter upon them, if the rent was not paid; that, in the year 1819, the said plaintiff and himself had a conversation in relation to the said rent, in which the plaintiff threatened to re-enter upon the premises for the non-payment, and, that the said Schofield had, on his part, in the said conversation, declared his total inability to make payment, and that, at the plaintiff's request, he agreed that the plaintiff should take possession of the premises and do what he pleased in consequence of the non-payment of the said rent; that, in the end of the year 1820, he received a letter from the plaintiff on the same subject, and that the letter now produced by the latter, was written by him in answer thereto; that after this he understood that the said plaintiff had re-entered on, and taken upon himself the management of the said premises, and he supposed that he meant no longer to look to him for the rents, and, in fact, that he had re-entered upon the premises; that, from the year 1819, to the present time, he has had nothing to do with the premises, nor has any claim been made against him for the rent. It is admitted that, during all this time, that is to say, from January 1821 to the present time, the said Jonathan Schofield is wholly insolvent.

The defendant then examined a witness, one Barton Lynch, who gave evidence to prove, that about the beginning of the year 1821, the plaintiff engaged him to labour for him at seventy-three dollars a year, and the plaintiff informed him that he was entitled to a ground rent upon the premises in question of seventy-three dollars; that if he would collect this rent, he might do so and apply it to his (the plaintiff's) credit on account of his labour, and that he might, so far as the plaintiff had any concern in the premises, do whatever he pleased towards renting and making the most of the property; that he did not mean to re-enter upon the property; that he immediately turned his attention and found two families living upon

it; that, under an authority from the plaintiff, he entered on and repaired the premises to a pretty considerable extent, and rented the property out, from time to time, for nearly three years, and received for the rents about one hundred and forty dollars, which was paid over to the plaintiff, or rather accounted for by him to the plaintiff, in the settlement of his account for his labour done for the plaintiff.

This evidence being given to the jury, with a view of showing that a re-entry had been made by the plaintiff upon the premises in question, the counsel for the plaintiff prayed the court to instruct the jury, that the said evidence was not competent to prove that the said plaintiff had re-entered upon the said premises, so as to vest in him a title to the said premises, and to bar him from the claim which he has here made; and that it was not even competent for the jury to infer from the said evidence, that such re-entry had been made: which instruction the court refused to give, being of opinion that the said evidence was competent to be left to the jury for their consideration, upon the question whether a re-entry had been made by the plaintiff according to the terms of the clause in the aforesaid original deed, from General Washington's executors to the said Ezra Lunt.

The court having refused to instruct the jury as aforesaid, the counsel for the plaintiff prayed the court to instruct the jury, that the time at which the re-entry ought to be made, depended upon the lease given in evidence by the plaintiff as aforesaid, and could not be varied by the evidence given, as aforesaid, by the defendant; and that if they found that a re-entry had been made, that it ought to be such as would conform to the deed; and that a mere occupation of the premises, by a landlord or his agent, or the receipt of rents of the premises did not, in themselves, amount to a re-entry; which instruction the court refused to give, being of opinion that it was for the said Schofield to waive any of the formalities required by law for his benefit.

The defendant then prayed the court to instruct the jury that if the jury should be satisfied by the said evidence, that the said Richard M. Scott did enter and take possession of the premises, under and by virtue of the clause of re-entry in the deed from General Washington's executors to the testator of

the defendant, it is competent for the jury to infer from the evidence aforesaid, that the said Jonathan Schofield assented to the said re-entry; and that if they believe that he did so assent, and he yet continues to assent to the said re-entry, and that the plaintiff has never since offered to reinstate the said Schofield in the possession of the said premises, that the said plaintiff is bound by the said entry, and cannot recover against the same, the rent which became due subsequently thereto; which instruction the court gave as prayed.

The counsel for the plaintiff excepted to the refusal of the court to give the instruction prayed by the plaintiff, and to the instruction given by the court on the prayer of the defendant. Judgment having been rendered by the court, in favour of the defendant, this writ of error was prosecuted.

The case was argued by Mr Swann, for the plaintiff in error; and by Mr Jones, for the defendant.

Mr Justice Story delivered the opinion of the Court.

This cause comes before us upon a writ of error to the circuit court for the district of Columbia, sitting in Alexandria.

The original suit is an action of covenant brought by Scott, as assignee, to recover the amount of certain rents alleged to be due and in arrear from the defendant, since the death of his intestate, under an indenture stated in the pleadings. The defendant pleaded in the first place, that he had not broken the covenants in the deed; after which plea, issue was joined. Afterwards, a general demurrer was put in to the declaration; which being joined by the plaintiff, was, upon the hearing, overruled by the court. Afterwards the plea of plene administravit was put in, which was withdrawn; and the cause was finally tried upon another plea; which, after oyer of the indenture, stated, that "before the days in the declaration specified for the payment of the rent to the plaintiff under the said deed, that is to say, on, &c. the plaintiff, under and by virtue of the condition of re-entry in the deed contained, did enter into the premises thereby demised, for non payment of certain rent then in arrear and unpaid, *and held and occupied the same as vested in him by the said entry as his absolute estate;*" upon which plea issue being joined, the jury found a verdict for the defendant.

A bill of exceptions was taken at the trial, which will presently come under consideration, as matter assigned for error.

The indenture referred to was made on the 8th of August 1799, between General George Washington and Martha his wife, of the one part, and Ezra Lunt, the defendant's intestate, of the other part. It purports, on the part of General Washington, to grant to Lunt, his heirs and assigns for ever, a parcel of land in Alexandria; he, Lunt, his heirs and assigns yielding and paying for the same, on the 8th day of August yearly, unto General Washington, his heirs and assigns, the sum of seventy-three dollars. And Lunt, and his heirs and assigns, covenant with General Washington, his heirs and assigns, that he, his heirs and assigns will yearly and every year for ever, well and truly pay the aforesaid sum of seventy-three dollars to General Washington, his heirs and assigns on the day, and at the time appointed for payment; and that it shall be lawful for General Washington, his heirs and assigns, at all times after the rent shall become due, to enter upon the premises, and distress and sale make of the goods and chattels found thereon, to satisfy the rent in arrear. And Lunt, his heirs and assigns, further covenant with General Washington, his heirs and assigns, that if the yearly rent or any part thereof, be behind or unpaid for the space of thirty days after the same becomes due and payable, and sufficient goods and chattels of Lunt, his heirs and assigns, shall not be found upon the premises to pay and satisfy the same, it shall be lawful for General Washington, his heirs and assigns, to re-enter and hold the same again, as if the indenture had never been made. And then follows a covenant of general warranty on the part of General Washington, his heirs and assigns.

The executors of General Washington, by virtue of powers given by his will, on the 25th day of August 1804, by indenture, after reciting the substance of the indenture, assigned and granted unto Henry S. Turner, his heirs and assigns, the said rent by the following descriptive terms: "the aforesaid annual rent of seventy-three dollars issuing out of and charged on the aforesaid piece or parcel of ground, herein before described." There are no words in this indenture assigning over the rights, powers, and remedies, given by the former indenture, by distress and re-entry, or the residuary interest in the pre-

mises resulting from such re-entry. Turner, by another indenture on the 25th of February 1808, assigned and granted the same rent unto the plaintiff (Scott), his heirs and assigns, with the powers of distress and re-entry, and all the covenants and stipulations in the original indenture. But it is manifest, that he could not convey them, unless he had already taken them under the assignment made to him by the executors. The declaration too is founded solely upon the assignment and transfer of the rent, and contains no allegation of any assignment of the collateral rights and remedies and interests in the estate.

Under these circumstances, it is contended, that whatever might be the fate of the bill of exceptions, if the action were otherwise unobjectionable, the plaintiff, upon his own showing, has no title to recover: first, because the rent is a mere chose in action, which cannot be transferred by itself to the assignee, so as to entitle him to sue therefor in his own name: and secondly, because no suit is maintainable against the defendant as administrator, for the rent in arrear, since Lunt's decease, as there is neither privity of estate, nor of contract, between him and the plaintiff. It is added, that Lunt, in fact, in his life-time, assigned over his estate in the premises, and that his administrator is not responsible for any rent subsequently accruing and in arrear. But this fact no where appears upon the pleadings; and if it did, it would not help the defendant: for it is firmly established, that upon a covenant of this sort, the personal representatives of the covenantor are liable for the non-payment of the rent after assignment, although there may also be a good remedy against the assignee(*a*). The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law in England, at the emigration of our ancestors.

Whether the plaintiff as assignee of the rent, not being assignee also of the estate, in the premises, or of the right of re-entry, can maintain the present suit, is quite a different question. If he had been the assignee of the estate, or of the right

(*a*) See Comyn's Dig. Covenant, C. 1. Bacon, Abridg. Covenant, E. 1, 4. Barnard v. Godscall, Cro. Jac. 309. Orgill v. Kemshead, 4 Taunt. Rep. 642.

of re-entry, as well as of the rent, he would clearly be entitled to maintain it; for the laws of Virginia are in this respect co-extensive with those of England. The common law of England, and all the statutes of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, which are of a general nature, and not local to the kingdom, were expressly adopted by the Virginia statute of 1776(*a*); and the subsequent revisions of its code have confirmed the general doctrine on this particular subject. The very point was decided in Havergill v. Hare, Cro. Jac. 510. There A. being seised of an estate in fee, by indenture granted to B. his heirs and assigns, a fee farm rent with a clause of distress; and covenanted to levy a fine to uses, for securing the payment of the rent; so that, if the rent should be in arrear, B. his heirs and assigns might enter into the land, and enjoy the rents thereof, until the rent in arrear should be paid to them; and B. assigned, by a bargain and sale to C. the rent, "with all the penalties, forfeitures, profits and advantages, comprized in the indenture." The fine was levied, the rent was in arrear, and C. entered, and brought ejectione firmæ; and a special verdict having been found, stating the above facts, one question was, whether this contingent and future use to arise upon non-payment of the rent, was transferable over to C., by the bargain and sale. It was strongly urged by the defendant's counsel, that it is a matter in privity and possibility only, which is not transferable before it falls in esse. But all the justices resolved, that it being a matter of inheritance, and being for the security for the payment of the rent, and waiting upon the rents, might well be transferred with the rent; and by the grant of the rent, the penalty and advantage well passed. But if it had been a mere possibility, not coupled with any other estate, then it had not passed. This case is full to the purpose that such a right of security is capable of being transferred, with the rent, by apt words; and even so transferred, gives the assignee a legal title both to the rent and the attendant remedies. It leaves, however, the point untouched, whether the mere transfer of the rent, without any transfer of the right of entry (as in the present case), would give the as-

(*a*) See 1 Virginia Revised Code, ch. 38, p. 135, edition of 1819.

signee a right to maintain an action for the rent, seeing it is not knit by any priority of right or estate to the premises. Upon full consideration, however, we are of opinion that the assignee of a fee farm rent, being an estate of inheritance, is upon the principles of the common law entitled to sue therefor in his own name. It is an exception from the general rule, that choses in action cannot be transferred; and stands upon the ground of being, not a mere personal debt, but a perdurable inheritance. Thus, if an annuity is granted to one in fee, although it be a mere personal charge, yet a writ of annuity lies therefor by the common law; not only in favour of the party and his heirs, but of their grantee. So the doctrine is expressly laid down by Lord Coke, Co. Litt. 144, b., and he is fully borne out by authority(*a*): and in like manner for a rent granted in fee and charged on land, a writ of annuity also lies in favour of the assignee, at his election(*b*).

And since the statute of 32 Henry 8, ch. 34, covenants of this sort running with the estate or inheritance, are transferable to the assignee with a full right to the benefit thereof. So that there is no difficulty upon principles of the common law, in giving effect to the present action. Whether the present plaintiff has any right to re-entry is a very different question, upon which in the present posture of this case it is unnecessary to give any opinion. It is clear, by the common law, that a right of re-entry always supposes an estate in the party; and cannot be reserved to a mere stranger. So the law was laid down by the twelve judges, in Smith v. Packard, 3 Atk. 135, 140; and Lord Chief Justice Willis, on that occasion, in delivering their opinion, said, "therefore I have always thought, that if an estate is granted to a man reserving rent, and in default of payment a right of entry was granted to a stranger, it was void." What effect the statute of 32 Henry 8, ch. 34, or the provisions of the revised code of Virginia, may have upon this point is a question not now before us.

We proceed, then, to the consideration of the bill of excep-

(*a*) See Co. Litt. 144, b., Hargrave's note, 1; Gerrard v. Boden, Hetley, 80; Mound's case, 7 Co. Rep. 28, b.; 1 Thomas's Co. Litt. 448, note F. and 449, note (9); Bac. Abridg. Annuity, C., Com. Dig. Annuity, E.

(*b*) Co. Litt. 144, b.

tions. Two instructions were prayed by the plaintiff, and one by the defendant. The latter was given by the court, and with reference to the state of the pleadings, we see no objections thereto: the difficulty is in the refusal of the second instruction prayed by the plaintiff. It is as follows: "the plaintiff prayed the court to instruct the jury that the time at which the re-entry ought to be made, depended upon the lease given in evidence by the plaintiff as aforesaid, and could not be varied by the evidence given as aforesaid by the defendant; and that if they found that a re-entry had been made, that it ought to be such as would conform to the deed; and that a mere occupation of the premises by a landlord or his agent, or the receipt of rents of the premises, did not of themselves amount to a re-entry." The court refused to give the instruction, being of opinion that it was competent for the said Schofield, the actual tenant, to waive any of the formalities required by law for his benefit.

Now, however correct may be the opinion of the court of this right of waiver upon general principles, still the question is, whether with reference to the actual terms of the pleadings and issue before the jury, the instruction prayed for was not such as ought, upon principles of law, to have been given. It is wholly immaterial, whether the pleadings might not have been so framed upon the facts as to have presented a complete defence to the action. The instruction prayed has reference to the pleadings in the case. The averment there is, that the plaintiff entered on the premises under and by virtue of the condition of re-entry in the original deed, mentioned, for non-payment of the rent; and upon the issue joined, this was the material inquiry. It is clear, that, upon such an issue, no entry not conforming to that deed, and no evidence of an entry varying from it, would be admissible to support it. The sufficiency of the evidence before the jury to support the issue was properly left for their consideration. But the defendant had a right to the instruction, that the proof must conform to the allegations in the pleadings. For these reasons we are of opinion that the circuit court erred in refusing the above instruction; and the judgment must on this account be reversed and a venire facias de novo be awarded

WALTER BRASHEAR, APPELLANT v. FRANCIS WEST, THOMAS M. WILLING AND HENRY NIXON, EXECUTORS OF JOHN NIXON DECEASED, AND HENRY NIXON, SAMUEL MIFFLIN AND JOHN LAPSELEY, ASSIGNEES OF FRANCIS WEST, APPELLEES.

FRANCIS WEST, HENRY NIXON, SURVIVING EXECUTOR OF JOHN NIXON DECEASED, AND HENRY NIXON, SAMUEL MIFFLIN AND JOHN LAPSELEY, ASSIGNEES OF FRANCIS WEST, APPELLANTS v. WALTER BRASHEAR, APPELLEE.

It is not necessary to the validity of a deed of assignment for the benefit of creditors, that creditors should be consulted; though the propriety of pursuing such a course will generally suggest it, when they can be conveniently assembled. But be this as it may, it cannot be necessary that the fact should appear on the face of the deed.

That a general assignment of all a man's property is *per se* fraudulent, has never been alleged in this country. The right to make it results from the absolute ownership which every man claims over that which is his own.

An assignment was made by Francis West, to certain trustees of all his property, giving a preference to particular creditors; who were to be paid their claims in full, before any portion of the property assigned was to be divided among his other creditors. By the court: the preference given in this deed to favoured creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property which the law has not yet restrained. It cannot be treated as a fraud.

The assignment excluded from the benefit of its provisions, all creditors who should not within ninety days, execute a release of all claims and demands on the assignor of any nature or kind whatsoever. By the court: This stipulation cannot operate to the exemption of any portion of a debtor's property, from the payment of his debts. If a surplus should remain after their extinguishment, that would be rightfully his. Should the fund not be adequate, no part of it is relinquished. The creditor releases his claim only to the future labours of his debtor. If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms, by giving the release. It is not therefore voluntary. Humanity and policy both plead so strongly in favour of leaving the product of his future labours to the debtor, who has surrendered all his property, that in every commercial country known to the court, except our own, the principle is established by law. This certainly furnishes a very imposing argument against its being denied. The objection is certainly powerful, that it tends to delay creditors. If there be a surplus, the surplus is placed in some degree out of the reach of those who do

not sign the release, and thereby entitle themselves under the deed. But the property is not entirely locked up. A court of equity, exercising chancery jurisdiction, will compel the execution of the trust, and decree what may remain to those creditors who have not acceded to the deed. Yet the court are far from being satisfied, that upon general principle, such a deed ought to be sustained.

Whatever may be the intrinsic weight of objections to such assignments, they seem not to have prevailed in Pennsylvania. The construction which the courts of that state have put on the Pennsylvania statute of frauds, must be received in the courts of the United States.

The assignment transferred to the assignees a debt due to the assignor by the complainant. The complainant filed a bill against the assignees, claiming to set off against the debt assigned to them, the amount of a judgment obtained by him against the assignor, after the assignment. By the court: if subsequent to the assignment being made, and before notice of it, any counter claims be acquired by a debtor to the assignor, these claims may, unquestionably, be sustained. But if they be acquired after notice, equity will not sustain them. If it were even true that they might have been offered in evidence in a suit at law brought in the name of the assignor, he who neglected to avail himself of that advantage, cannot, after judgment, avail himself of such discount as plaintiff in equity.

To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them. The party complaining, must show that he has more equity than the party in whose favour the law has decided.

Construction of the laws of Pennsylvania relative to foreign attachments.

APPEALS from the circuit court of the United States for the district of Kentucky.

These cases were argued by Mr Bibb for the appellant, Walter Brashear; and by Mr Sergeant and Mr Peters, for the appellees.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

These are appeals from a decree pronounced in the court of the United States for the seventh circuit and district of Kentucky, on a bill filed by Walter Brashear, on which an injunction was awarded to stay proceedings on two judgments obtained against him in that court, by Francis West. The final decree perpetuated the injunction as to the sum of four thousand and eleven dollars and sixty-eight cents, the supposed

amount of a judgment obtained against the complainant as special bail for West, and dismissed the bill as to the residue, with ten per cent damages thereon. Both parties have appealed to this court.

Francis Brashear, the plaintiff, a resident of Kentucky, being in Philadelphia, executed two notes on the 28th of February 1807, to Francis West, a citizen of Philadelphia, for three thousand five hundred and twenty-seven dollars and eighty-two cents each, payable fifteen months after date. On the 13th of July 1808, he executed a paper writing, in Kentucky, acknowledging the balance of an account due from himself to West, amounting to two thousand one hundred and forty-seven dollars and seventy-six cents.

The two notes, executed in February 1807, were assigned soon after their date to John Nixon of Philadelphia, as collateral security for a debt due from West to him.

On the 21st of April 1807, West assigned all his estate to trustees to be sold, and the money paid, first to certain preferred creditors, and afterwards to his creditors generally; with a proviso that no creditor should be entitled to receive any dividend who should not, within ninety days from the date of the deed, execute a release of all claims and demands upon the said Francis West, of any nature or sort whatsoever.

The plaintiff was also indebted to James Latimer of Philadelphia, to whom he consigned a quantity of ginseng with instructions to pay the proceeds, after discharging his own debt, to certain other creditors of the consignor, pro rata.

On the 10th of December 1808, James Latimer, to prevent other creditors, as he alleges, from obtaining a prior lien on the property in his hands, sued out a foreign attachment against the effects of Brashear, summoning himself as garnishee, and requiring bail in the sum of eight thousand dollars. He gave immediate notice of this proceeding to Brashear.

Early in the year 1809, he took a large part of the ginseng to himself, as purchaser, at six months credit; which he shipped on his own account to China, in March of that year. In the following May he shipped the residue, on account of himself and William Redwood.

On the 11th of March 1809, Francis West sued out a foreign attachment to the use of his assignees, against Brashear, and

summoned Latimer as garnishee. The process was executed the 7th of April.

On the 23d of September 1809, an attachment was sued out by Nixon's executors, which was returned executed on the 9th of October.

The attachments sued out in the name of West, by his assignees, and by Nixon's executors, were prosecuted to judgment.

In August 1811, James Latimer became insolvent, and assigned all his property for the benefit of his creditors. His debt to Brashear amounted to four thousand nine hundred and eighty-five dollars and thirty-five cents; no part of which could be collected, his whole estate being absorbed by preferred creditors.

Suits were instituted, in the name of Francis West, on the notes assigned to John Nixon, and on the acknowledged account herein before mentioned, in the circuit court of the United States for the district of Kentucky, and judgments obtained thereon. A bill was filed by Walter Brashear to be relieved from these judgments.

The bill alleges that the assignment to Nixon, and also that to Mifflin and others, trustees for general creditors, are fraudulent and void. It also alleges, that in September 1808, the plaintiff had become special bail for the said Francis in a suit instituted against him in one of the courts of Kentucky, by a certain George Anderson, in which judgment was obtained against him, and afterwards against the plaintiff as his special bail, for the sum of four thousand and eleven dollars and sixty-eight cents. That on the 3d day of November 1808, the said Francis West received for the plaintiff one hundred and twenty dollars, from the commissioner of loans in the city of Philadelphia, on account of the claim of William Bush; to which the plaintiff was entitled. And that the said Francis West was responsible for the money lost by the plaintiff in the hands of James Latimer; that loss having been caused by the attachments sued out to attach his effects in the hands of the said Latimer, and by the negligent and illegal manner in which the said attachments were prosecuted.

The answers admit that the assignment to Nixon was made for the purpose of securing a debt due to him, amounting to

rather more than two thousand dollars. They insist that the assignment to Mifflin and others, for the benefit of the creditors of West, was fair and legal; and that Brashear had notice of it before he became special bail for West at the suit of Anderson.

They contend that the attachments were legal, and were conducted regularly, and without fraud.

James Latimer, who was sworn as a witness, deposes that he shipped part of the ginseng on his own account, before the attachments were laid by the assignees of West; and that he shipped the residue after the attachment sued out by Mifflin and others, trustees for the creditors, had been served. He says there was not any collusion, agreement or consent between the executors of Mr Nixon, or the assignees of Mr West and himself, that the property or money attached should remain in his hands, should be shipped abroad, or used or disposed of in any way; other than the consent of the assignees of Mr West, that the ginseng might be sold; which consent was after their attachment, and before that of Mr Nixon's executors; nor was there any consent on the part of the said assignees or executors to any delay or procrastination of payment on his part.

The court admitted and allowed the claim to a set off for the money paid by the plaintiff as special bail for West, at the suit of Anderson, but rejected the other claims.

It is admitted that Nixon's executors have no interest in the notes assigned to their testator, beyond the debt intended to be secured; and to that extent their claim cannot be controverted. The suggestions made in the bills against it, are unsupported; and are denied in the answer.

The first inquiry is into the validity of the general assignment to Mifflin and others, trustees for the creditors of West.

This instrument conveys to Samuel Mifflin, John Lapseley and Henry Nixon, all his estate, real, personal and mixed, in trust to sell the same as soon as conveniently may be, and to collect all debts due to the said West, and to pay and discharge the debts due from him, first to certain preferred creditors, and afterwards to creditors generally; "provided, nevertheless, that none of the above described creditors shall be entitled to receive any part or dividend of the property hereby conveyed, or its proceeds, who shall not, within ninety days from the date

hereof, sign and execute a full and complete release of all claims and demands upon the said Francis West, of any nature or sort whatsoever."

This deed was executed on the 21st day of April 1807, was acknowledged before the mayor of the city of Philadelphia on the 22d, and was recorded in the proper office of the city and county on the 27th of the same month. Its validity appears never to have been questioned in the state of Pennsylvania.

The objections made to it in argument are,

1. That the creditors were not consulted.
2. That they do not appear to have assented to the deed.
3. That possession was not delivered.
4. That the assignment is in general terms.
5. That it excludes all creditors who shall not, within ninety days, execute a release of all claims and demands on the said Francis West, of any nature or sort whatsoever.

1. It is not necessary to the validity of a deed of assignment that creditors should be consulted, though the propriety of pursuing such a course will generally suggest it, where they can be conveniently assembled. But be this at it may, it cannot be necessary that the fact should appear on the face of the deed. Had it been material, it ought to have been suggested in the bill. The fact would then have been put in issue, and might have been proved.

2. The same answer may be given to the second objection. The bill does not allege the refusal of the creditors to assent to the deed of assignment. That fact is not put in issue. The acceptance of the trust by the trustees, and the acquiescence of the creditors for more than twenty years, afford presumptive evidence in favour of their assent: and that is sufficient, in a case in which it is not made a subject of direct inquiry by the pleadings.

3. The real estate passed by delivery of the deed. The claims on Brashear were not objects of delivery. They could be assigned only in equity; and notice, when given, consummated the assignment. The question of delivery is not made in the proceedings. It is not alleged that West retained possession of any part of the property conveyed in the deed. Fraud may be given in evidence, but is not to be presumed.

4. It is also objected that the assignment is in general terms, and that no schedule of the property is annexed.

That a general assignment of all a man's property is, per se, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own. That it is a circumstance entitled to consideration, and in many cases to weighty consideration; is not to be controverted. If a man were to convey his whole estate, and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit. The transaction would be closely inspected, and a sweeping conveyance of his whole property would undoubtedly form an important item in the testimony to establish fraud. So, in many other cases which might be adduced. But a conveyance of all his property for the payment of his debts, is not of this description. It is not of itself calculated to excite suspicion. Creditors have an equitable claim on all the property of their debtor; and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims. The exercise of this right by the honest performance of this duty cannot be deemed a fraud. If transferring every part of his property, separately, to individual creditors in payment of their several debts, would be not only fair but laudable; it cannot be fraudulent to transfer the whole to trustees for the benefit of all.

In England such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of a bankrupt's estate and disposes of it. But, in the United States, where no bankrupt law exists for setting aside a deed honestly made for transferring the whole of a debtor's estate, for the payment of his debts; the preference given in this deed to favoured creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained. It cannot be treated as a fraud.

5. The fifth and most serious objection is, that the deed excludes all creditors who shall not within ninety days execute a release of all claims and demands on the said Francis West, of any nature or kind whatsoever.

The stipulation cannot operate to the exemption of any portion of a debtor's property from the payment of his debts. If a surplus should remain after their extinguishment, that would be rightfully his. Should the fund not be adequate, no part of it is relinquished. The creditor releases his claim only to the future labours of his debtor. If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms by giving the release. It is not therefore voluntary. Humanity and policy however both plead so strongly in favour of leaving the product of his future labour to the debtor, who has surrendered all his property, that, in every commercial country known to us, except our own, the principle is established by law. This certainly furnishes a very imposing argument against its being deemed fraudulent.

The objection is certainly powerful, that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. The weight of this argument is felt. But the property is not entirely locked up. A court of equity, or courts exercising chancery jurisdiction, will compel the execution of the trust; and decree what may remain to those creditors who have not acceded to the deed. Yet we are far from being satisfied that, upon general principles, such a deed ought to be sustained.

But whatever may be the intrinsic weight of this objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that state have put on the Pennsylvania statute of frauds must be received in the courts of the United States.

In Lippincott and Annesly v. Barker, 2 Binney, 174, this question arose, and was decided, after elaborate argument, in favour of the validity of the deed. This decision was made in 1809; and has, we understand, been considered ever since as settled law.

In Pierpoint and Lord v. Graham, 4 Wash. Rep. 232, the same question was made, and was decided by Judge Washington in favour of the validity of the deed. This decision was

made in 1816. We are informed of no contrary decision in the state of Pennsylvania, and must consider it as the settled construction of their statute. The validity of the deed cannot now be controverted, no actual fraud being imputed to it.

2. The assignment of the debt due from Brashear to West being valid in equity, has Brashear a right to set off, in equity, against judgments obtained for the use of the assignees in the name of West, his claims against West for the money paid to Anderson, and for the money received on Bush's claim?

The question, whether he might have availed himself of these offsets at law, does not now arise. Can he avail himself of them as plaintiff in equity?

That a chose in action is assignable in equity, is not controverted. Equity will protect and enforce the assignment. If subsequent to its being made, and, before notice of it, any counter claims be acquired by the debtor, these claims may unquestionably be sustained. But if they be acquired after notice, equity will not sustain them. If it were even true that they might have been offered in evidence in a suit at law brought in the name of the assignor, he who has neglected to avail himself of that advantage, cannot, after the judgment, avail himself of such discounts as plaintiff in equity. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them. The party complaining must show that he has more equity than the party in whose favour the law has decided. This cannot be done in a case like the present, unless the equity of the debtor accrued before notice of the assignment. The right to these discounts then depends on the fact of notice.

The assignment was made on the 21st of April 1807. In September 1808, Brashear became special bail for West in a suit instituted by George Anderson. The bill alleges that at the time of becoming special bail, Brashear had no notice of the assignment. The answer avers that he had notice.

It is contended in argument, that the fact of notice is not sufficiently proved by the answer. This cannot be admitted. The defendant has a judgment at law, and the plaintiff comes into court to set aside that judgment by his superior equity. He must show that equity.

A circumstance appears in evidence which has some ten-

dency to support the answer. In July 1808, the account was settled between Brashear and West, and the balance acknowledged. This account calculates interest up to the 21st of April 1808, the day on which the assignment was made; and strikes the balance on that day. The coincidence countenances the belief that the calculation of interest stopped on that day, because the account was then transferred; and increases the probability that West, who acknowledged the account, was informed of the reason.

We think then that Brashear, having had notice of the assignment when he became special bail for West, cannot be permitted to set off the money paid on that account against the judgment, unless he was induced to trust West by the conduct of the assignees. Of this we find no evidence in the record.

The money received by West for Bush's claim is a still later transaction, and is consequently subject to the same rule.

5. The last point to be considered is the claim of Brashear to compensation for the loss of the money attached in the hands of Latimer.

The bill charges that this money would have been paid by Latimer, had he not been restrained by the attachments; that those suits were wilfully or negligently procrastinated by the plaintiffs, whose duty it was to have brought them to a conclusion, and to have obtained the money which ought to have been adjudged to them, before Latimer became insolvent; and farther, that the effects attached ought to have been secured by measures which the law authorized, but which were totally omitted.

The answers deny these charges, and aver that the suits were prosecuted with diligence, and every step taken to secure the debts which the law prescribed.

The first impression would be that the creditors who sued out their attachments were desirous of obtaining their money, and would not intentionally interpose obstacles to the accomplishment of their object. It may also be stated with some confidence, that those who sue out process authorized by law, are not responsible for the loss consequent from that process, unless that loss is produced by the improper use made of it. The charges made in the bill and denied in the answers, must be

supported by evidence, or the plaintiff cannot prevail. He relies on the proceedings in the attachment as furnishing this evidence.

The writ sued out by the assignees of Francis West, in his name, was returnable to June term 1809. The defendant not appearing, judgment was rendered against him at the third term, on the 20th of January 1810; which was as soon as by the course of the court it was attainable. No further step appears to have been taken in this cause. The court is not satisfied that, had a scire facias been sued out against the garnishee, judgment could have been obtained before he became insolvent.

Nixon's executors sued out their attachment in October 1809, and obtained judgment at the third term by default. A writ of inquiry of damages was awarded in March and executed in June term 1811; and final judgment rendered for eight thousand three hundred and twenty-eight dollars and thirty cents, the damages assessed by the jury. A scire facias was immediately sued out against Latimer, the garnishee, returnable to September court. In the preceding August, Latimer became insolvent.

The only delay with which Nixon's executors can be chargeable is the interval between the rendition of the judgment and the awarding of the writ of inquiry.

Is this delay so culpable as to charge the executors with the loss resulting from the insolvency of Latimer? In pursuing this inquiry, the situation of the parties and of the cause must be taken into view.

When this attachment was sued out, no property on which it could be served was in the hands of the garnishee. The ginseng had been all shipped by Latimer, and the money in his hands had been attached by himself and by the assignees of West, both of which had a right to prior satisfaction. Had they proceeded with as much expedition as the course of the court would admit, to ascertain the amount of their damages, and to sue out upon the judgment for those damages, a scire facias against the garnishee, there must have been some complexity and delay in ascertaining the amount of the prior claims of the attachments of Latimer and of West's assignees, both of which had priority to theirs. It is not shown that a judgment against the garnishee could have been obtained before he became insolvent. At any rate, there was much reason to

believe that the affair would be more expeditiously as well as more satisfactorily arranged by the parties themselves.

In November 1809, Nixon's executors addressed a letter to Walter Brashear, informing him of their attachment, as well as of that issued by West's assignees, and urging him to make provision for the sum which would remain due after exhausting the fund in the hands of Latimer. The letter concludes with saying, "we think a direction from you to Mr Latimer to pay over the balance due on your ginseng on the attachments would save you much interest; as many months must elapse before the law will possess either the assignees or us of our legal claims."

The record shows that the proceedings of the executors were embarrassed by the claims of West's assignees, on account of the surplus due on the notes assigned to John Nixon after payment of his debts. In a letter of the 7th of March 1810, to the assignees, they say, "enclosed is our reply of the 28th ultimo to Mr West's objections to the account of the late Mr Nixon, as rendered on his assignment. You will oblige us by considering our remarks, and withdrawing all opposition to our attachment on Dr Brashear's property in the hands of Latimer. You certainly can demand of us a settlement, and we must pay over to you any thing recovered beyond what will satisfy the just demand of Mr Nixon's estate." The letter referred to is also in the record. It shows that Mr West made specific objections to their claims.

After judgment against Latimer, the executors consulted counsel, whose opinion was that the garnishee might safely pay the money in his hands into court. The letter communicating this opinion is in the record. Mr Latimer states the fact in his deposition, but says that his counsel thought differently.

Late in 1810, or early in 1811, Dr Brashear was in Philadelphia. The executors addressed a letter to him of the 2d of February, in which they say, "we beg leave to call your attention to the following letter, and to state, your funds in Mr Latimer's hands must lie without interest under the attachment until they are divided; unless you order him to pay over the same in the proportions that are due, first to Mr West's assignees for the balance of your account as settled with Mr West when in Kentucky; and what remains on the two

notes in our possession, as stated in our letter of the 4th of November last, together seven thousand and fifty-five dollars sixty-three cents."

In a letter to Dr Brashear, after the failure of Latimer, they say, "it was our hope that before your departure for Kentucky an arrangement would have been made by you with Mr Latimer, which would have enabled us to have received from your effects in his hands the amount of your notes in our possession. In this expectation we were disappointed. Being left to legal remedy under the attachment, judgment has been had, &c."

It appears that Dr Brashear had full knowledge of the attachments, and might have directed Mr Latimer to bring the money into court. He was himself in Philadelphia, and might then have arranged the business according to his own judgment. He does not appear to have taken any step to facilitate its termination. He might have given special bail, and have released the attached effects. He has not done so.

We think the delay of Nixon's executors to proceed with the execution of the writ of inquiry to assess damages, is accounted for; and that it is by no means certain that had they proceeded with the utmost despatch, they could have forced the money out of the hands of the garnishee before his failure. We think that more blame attaches to Doctor Brashear than to the executors, and that the loss is to be ascribed to himself in a greater degree than to them.

The attachment sued out by the assignees of Mr West, in his name, is attended by different circumstances, and presents a question of more difficulty. The interval between their judgment and the failure of Latimer, was nineteen months. Their claim on the fund due from Latimer to Brashear, had priority to that of any other creditor. Mr Brashear states in his deposition, that a part of the ginseng, more than one third, was in his possession when the attachment for the use of the assignees was served. This ginseng was soon afterwards shipped by himself and another on their own account, and the sale was made with the consent of the assignees.

The act "about attachments" directs that the manner of executing the writ "shall be by the officer's going to the house, or to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declaring in the presence of one or more credible persons in the

neighbourhood, that he attacheth the same goods or effects. From and after which declaration, the goods, money or effects, so attached, shall remain in the officer's power, and be by him secured; in order to answer and abide the judgment of the court in that case, unless the garnishee will give security therefor."

The language of the act seems to require that the specific property attached should be taken into possession by the officer, unless the garnishee will give security therefor. At all events the law provides positively that they shall remain in his power. The reasonable construction of the act would seem to be, that if the officer leaves them in possession of the garnishee without security, he is himself surety for their forthcoming; and in the mean time he retains the power to remove them. The possession of the garnishee must be virtually his possession: and thus that power of the officer over the attached effects which the law requires would be preserved.

Mr Sergeant, in his Treatise on Attachment, p. 14, 15, says, "there can be no difficulty in the service of the writ in this case where the property is shown to the officer, and is admitted by the person in possession to be the property of the defendant in the attachment as alleged or supposed by the plaintiff. But the garnishee may conceal the alleged property, or contest the ownership, liability, &c. And of these and other circumstances, the officer cannot judge, but they are subsequently to be examined into and decided upon by interrogatories or by evidence on trial." In these cases the officer would not be bound to take possession or security from the garnishee, unless indemnified by the plaintiff.

In consequence of these and other difficulties, Mr Sergeant continues, "the usual practice is, where there is a garnishee, merely to serve a copy of the writ of attachment on the person named as garnishee with notice annexed by the officer, that by virtue of the writ of which that is a copy, he attaches all and singular the goods and chattels of the defendant in his hands or possession, and summons him as garnishee: in which case the return of the officer is in the same general terms; leaving the existence, nature, extent, and liability of the property to be developed in the subsequent proceedings by interrogatory or by evidence on the trial.

In the case at bar the officer proceeded in what Mr Ser-

geant says, is the usual manner. The service and the return were general, and the property remained in the possession of the garnishee. Yet there was no concealment of the property, nor contest about the ownership. The difficulties which caused the practice stated by Mr Sergeant did not arise. We are not informed whether this practice is understood in Pennsylvania to have so far changed the law, that no responsibility is in any case incurred by the officer who leaves the attached effects in the hands of the garnishee without security: nor are we informed whether these effects are supposed to remain in the power of the officer.

They must undoubtedly be to a certain extent in the custody of the law. If, under this modern practice, they are understood to be confided by the law to the garnishee, still he must keep them safely; and he is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.

The attachment for the use of the assignees was served in April 1809, and before the attached effects were shipped to China by the garnishee on account of himself and William Redwood. The assignees, as is stated by the garnishee, consented to the sale. They have then, by their own acts, aided the garnishee in violating the confidence reposed in him by the law, and the duty growing out of that confidence. If the goods were, in legal contemplation, still in the power of the officer, they have combined with the garnishee to take them out of his power. By this act a total loss has been produced. By converting this ginseng into a debt due from the garnishee they have made it his interest, if in declining circumstances, to interpose obstacles to the regular course of the law, and to delay the proceedings as far as might be in his power. He refused to bring the money into court when urged to do so by Nixon's executors. It is not probable that he would have refused to produce the ginseng. The plaintiff, on the most reasonable presumption, has lost the value of the ginseng which was attached in the name of West for his assignees, by this unjustifiable interference. We think them legally responsible for this loss.

The counsel for West's assignees contend that the testimony of Latimer ought not to be regarded, because, supposing the fact to be as charged in the bill, it is not proved as charged. The

allegation of the bill is that the attaching creditors "permitted the whole fund to remain subject to the management of Latimer, even assenting and encouraging its export." Latimer says, "there was not any collusion, agreement or consent between the executors of Mr Nixon, or the assignees of Mr West and myself, that the property or money attached should remain in my hands, should be shipped abroad or should be used or disposed of in any way, *other* than the consent of the assignees of Mr West that the ginseng might be sold; which consent was after their attachment and before that by Mr Nixon's executors.

At a time then when the ginseng was placed in the custody of the law, and withheld from the control of Brashear by the attachment of West's assignees, they consented to its being taken out of the custody of the law and sold. The loss of the article, so far as we can judge, is the consequence of this consent. That they did not mention its exportation, in terms, is we think unimportant. The place of sale was not prescribed. The foreign was the ultimate and the best market for the article. An unlimited power to sell, given to a person in the habit of exporting it to China, without mentioning the place of sale, included, and must have been understood to include a power to dispose of it in the usual manner.

The assignees also insist that the accounts furnish cause for believing that the witness is mistaken, in supposing that part of the ginseng was shipped after their attachment was levied.

If any obscurity exists in the testimony, the difficulty may be removed by leaving the fact to be investigated in the circuit court.

The assignees also insist on the fact that Latimer was the agent of Brashear for the purpose of selling his ginseng; and must still be considered as his agent in the sale itself. He must therefore be understood as selling with the consent of Brashear, as well as with that of the assignees.

But the attachment suspended all power of selling under the authority given by Brashear. To implicate him in this transaction, some actual interference on his part must be shown. None is even alleged. It is not to be presumed; for Latimer could not have paid the proceeds of the ginseng to Brashear while the attachment remained.

The counsel have insisted that the attaching creditors could

not have taken the property out of the hands of the garnishee. Admitting them to state the law of Pennsylvania correctly, and we cannot doubt it, still the property was in the custody of the law, and would have remained safely in its custody, so far as we are informed by the testimony, had not the assignees consented to the removal of that protection.

We are of opinion that the plaintiff ought to have been allowed a credit for the amount of the ginseng sold by the garnishee with the consent of the assignees of West, and shipped by Latimer, for himself and Redwood. But that he ought not to have been allowed a credit for the money paid by him as special bail for George Anderson. The decree is to be reversed and the cause remanded to the circuit court with directions to reform the said decree according to this opinion. The parties to bear their own costs in this court.

On consideration of this cause, this court is of opinion that there is error in the decree of the said circuit court, in allowing to the said Walter Brashear, credit for the money paid by him as special bail for Francis West, at the suit of George Anderson; and also in refusing to allow the said Walter Brashear credit for the value of the ginseng, shipped and sold by the said James Latimer, with the assent of the assignees of Francis West, after the same had been attached in his hands, by the said assignees. It is therefore decreed, and ordered, that the decree pronounced in this cause by the court of the United States, for the seventh circuit, in the district of Kentucky, be reversed and annulled, and that the cause be remanded to that court, with instructions to perpetuate the injunction as to the sum which shall be equal to the amount of the ginseng shipped and sold by the said James Latimer, after the attachment sued out by Francis West for the use of Samuel Mifflin, James Lapseley, and Henry Nixon, assignees for the benefit of his creditors, was levied; and to dismiss the bill as to the residue.

And it is further ordered, that the parties pay their own costs in this court.

The same decree was entered in the case of West and others v. Brashear.

THE HEIRS OF P. F. DUBOURG DE ST COLOMBE, APPELLANTS v. THE UNITED STATES.

A complex and intricate account is an unfit subject for examination in a court, and ought always to be referred to a commissioner, to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions, and thus bring any question they may think proper before the court.

APPEAL from the district court of the United States for the eastern district of Louisiana.

The case was argued by Mr Livingston, in a printed argument, for the appellants; and by Mr Taney, attorney-general, for the United States.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

The United States had obtained judgment against P. F. Dubourg de St Colombe, in his lifetime, for a large sum of money. This judgment was revived after his death; or in the law language of Louisiana, declared executory; and the property of which he died possessed, ordered to be seized and sold to satisfy the demand of the United States.

The heirs of P. F. Dubourg de St Colombe filed their bill, praying an injunction to stay proceedings at law on this judgment.

The bill alleges that the estate of their parents was held in common at the death of their mother, and that the moiety belonging to their mother descended at her death on them, and was not liable for debts, afterwards contracted by their father. It also alleges that they were infants, and that their father took possession of their estate, which he had wasted to an amount exceeding his effects in their hands. The law of Louisiana, they say, gave them a lien at the death of their mother on all the estate of their father, to the extent of this waste, exempt from the claim of any subsequent creditor.

Several witnesses were examined, and several documents filed to prove the amount of the estate, at the death of their mother. The accounts are complex and intricate. The judge examined them, and being of opinion that the estate was insolvent at the death of the mother, dissolved the injunction and decreed costs. This has been understood to be a final decree, and to be equivalent to dismissing the bill. The plaintiffs appealed to this court.

We are of opinion that a complex and intricate account is an unfit subject for examination in court, and ought always to be referred to a commissioner to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions; and thus bring any question they may think proper before the court. The decree therefore is reversed, and the cause remanded to the court of the United States for the eastern district of Louisiana, with directions to refer the account to a commissioner, with instructions to settle and report the amount of the estate at the death of the wife, in order to a final decree; and to state such matters specially as he may think necessary, or as either party may require.

Ex parte Juan Madrazzo.

Juan Madrazzo, a subject of the king of Spain, filed a libel praying *admiralty* process against the state of Georgia, alleging that the state was in possession of a certain sum of money, the proceeds of the sale of certain slaves which had been seized as illegally brought into the state of Georgia; and which seizure had been subsequently, under admiralty proceedings, adjudged to have been illegal, and the right of Madrazzo to the slaves, and the money arising from the sale thereof, established by the decision of the circuit court of the United States for the district of Georgia. The counsel for the petitioner claimed that the supreme court had jurisdiction of the case, alleging that the eleventh amendment of the constitution of the United States, which declares that the judicial power of the United States shall not extend to any suits in *law* or *equity*, did not take away the jurisdiction of the courts of the United States, in suits in *the admiralty* against a state. Held, that this is not a case where property is in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person. It is a mere personal suit against a state to recover proceeds in its possession, and such a suit cannot be commenced in this court against a state.

MR WHITE presented a libel, in the admiralty, against the state of Georgia, claiming relief by the aid of this court, in favour of the libellant, a subject of his catholic majesty the king of Spain, domiciled in the city of Havanna.

The right of the libellant to maintain this proceeding against the state of Georgia, Mr White stated, depended on the construction the court would give to the eleventh amendment of the constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to *any suit in law or in equity*, commenced or prosecuted against one of the United States by citizens of another state; or by citizens or subjects of any foreign state."

If the court should be of opinion, that, notwithstanding this amendment, jurisdiction could be entertained in a *suit in the admiralty* against a state, he asked that a citation in the nature of admiralty process, or such other proceedings in the case, as the court should deem proper, should be awarded against the state of Georgia, returnable to the next term of this court.

The libel stated that the libellant, Juan Madrazzo, was a

subject of the king of Spain; that about the 2d July 1817, a vessel called the Isabelita, owned by him, with all the documents on board to show her ownership and character, cleared out from the city of Havanna for the coast of Africa with a cargo of merchandize, his property, to trade there, exclusively on Spanish account, for a cargo of slaves, to be conveyed to the said city, there to be disposed of for his sole account, property and risk. On the coast of Africa the vessel took on board, purchased with the said merchandize, one hundred and twelve slaves, and on her return voyage towards Havanna, about the 1st of October 1817, she was captured by a piratical or insurgent cruiser, under the commission of one Aurey, or some other revolutionary flag of the revolted colonies of Spain not then recognized as an independent government, or in any manner authorized to act as a belligerent power, by the laws or consent of nations. The capturing vessel was called the Successor, commanded by one Moore, an American citizen, and was fitted out at Baltimore, and in the river Severn in the state of Marylar d, for the purpose of carrying on hostilities against the property and subjects of the king of Spain, with whom the United States then were and still are at peace; wherefore the said capture of the vessel was illegal, piratical and felonious.

The Isabelita and her cargo were carried by the Successor into the port of Fernandina in the island of Amelia, at that time a colony of Spain, but usurped by the pretended patriots or revolutionists affecting the rights of sovereignty and a separate station as a revolted independent government, but in truth composed of a band of adventurers, chiefly American citizens, united principally by the hope of plunder, and not acknowledged as an independent government for any civil or national purpose. There the Isabelita and her cargo were condemned as lawful prize to the illegally commissioned piratical vessel, the Successor; by a tribunal pretending to exercise admiralty jurisdiction, under the usurped and assumed government of the place.

The vessel was afterwards restored to the libellant by a decree of the district court of the United States for the district of South Carolina, exercising jurisdiction as a court of admiralty, upon a libel filed for restitution on behalf of the libellant. The proceedings in that case are invoked and referred to. The

slaves, the cargo of the Isabelita, were sold under the illegal decree pronounced at Fernandina, and by one William Bowen, the purchaser, were conveyed to the Creek nation, where, at a place called "the United States Agency," within the limits of the said nation, they were, to the number of ninety-five, seized and taken possession of by an officer of the United States, and brought within the limits and district of Georgia. These ninety-five slaves were subsequently delivered over to the government of the state of Georgia, on pretence that they had been illegally imported or introduced into the United States, contrary to an act of congress, and in compliance with an act of the assembly of the state of Georgia to carry the same into effect. A part of the slaves were sold by the government of Georgia or its officers or agents, without any form of trial or judgment, as directed by the said act of assembly; and the proceeds thereof, to the amount of forty thousand dollars, paid into the treasury of the state of Georgia.

The residue of the slaves, twenty-seven or thirty in number, remain in the possession of the state or its officers, or have been converted to or disposed of by the state, for its own use; or wrongfully delivered to some persons not entitled to the same, and contrary to the will of the libellant. The slaves, or the proceeds of those sold, could not rightfully become the property of the state of Georgia, by virtue of the piratical capture, seizure or condemnation, or by the unlawful acts of the pretended purchaser of the same; but the same remain the property of the libellant.

The libel further states that the governor of the state of Georgia, on the 20th of May 1820, on the pretence that the said negroes had been illegally transported to the Creek nation, and unlawfully imported into the United States from some foreign place, with intent to hold them to service and labour, filed a libel in the district court of the United States for the district of Georgia, alleging the unlawful importation, and that a demand of them had been made by the society for the colonization of free people of colour in Africa; which the governor alleged he was desirous of complying with, if authorized to do so by a decree of the court. No specification is made of the number of the slaves, and no mention is made of the illegal seizure and

sale of the slaves, in the information, or of the payment of the forty thousand dollars into the treasury of the state of Georgia.

The libel further states, that William Bowen, who had purchased the slaves, the cargo of the Isabelita, put in a claim for the whole of the said slaves, on the 7th November 1820; alleging that they were his property, and were not intended to be introduced into the United States, but had been carried into the Creek nation for safety, with the intention to remove them to West Florida, a colony of Spain; the truth of which allegation the libellant admits. The libellant, hearing of the proceedings in the district court of Georgia, filed a libel claiming the slaves; and the district court dismissed the claim of William Bowen and of the libellant, and decreed in favour of the governor of Georgia. That decree, on appeal to the circuit court of the United States was reversed; the claims of the state of Georgia and of William Bowen were dismissed; and that court decreed that the said slaves should be restored to the libellant, Juan Madrazzo, together with the proceeds of them, sold and paid into the treasury of the state of Georgia.

From this decree, the governor of Georgia, on behalf of the state, appealed to this court.

From the district court of the United States of Georgia, a warrant of arrest upon the libel of this libellant was issued; but the execution being prevented or evaded by the government and officers of the state of Georgia, the same was never served. A monition was also issued, and served on the governor and treasurer of the state of Georgia.

The libel proceeds to state the proceedings in the circuit court of the sixth circuit, in which it was ordered that it should be held a sufficient execution of the warrant, if the governor of Georgia should sign an acknowledgement that the slaves were held by him, subject to the jurisdiction of the court; upon which, on the 15th of May 1823, John Clark, the governor of Georgia, signed a paper filed in the court on the 24th December 1823, by which he acknowledged, that the governor of Georgia held the negroes levied on by virtue of sundry executions by the sheriff of Baldwin county, "subject to the order of the circuit court of the United States for the district of Georgia, after the claim of the said sheriff, or prior thereto if

the claim in the circuit court shall be adjudged to have priority of the proceeding in the state court."

The libel states that the executions referred to had been levied on the slaves as the property of William Bowen, and the proceedings in the case showed that the same did not belong to him. That the libellant relied on the stipulation entered into by the governor of Georgia, by which the jurisdiction of the circuit court of the United States was admitted; and he proceeded to prosecute his appeal in the circuit court, in which no exception to its jurisdiction in the case was suggested or moved.

In the circuit court the rights of the libellant were established; the illegal outfit of the Successor was fully proved; and every other matter shown to entitle him as a Spanish subject to the restitution of his plundered property.

From the decree of the circuit court, appeals were entered to the supreme court of the United States.

The libel then states the proceedings in the cases in the supreme court at January term 1828, as the same are reported in 1 Peters's Supreme Court Reports, 110, &c., and complains that the jurisdiction of the supreme court in the case was denied by the governor of Georgia on behalf of the state, in direct violation of the stipulation entered into by him, consenting to, and acknowledging the said jurisdiction; by which the said court were prevented proceeding to give a decree or judgment in the case. That by reason of the proceedings aforesaid, and of other acts of the state of Georgia, her officers and agents, which the libel alleges to have been tortious, and by the sale and dispersion of the slaves, the libellant is prevented seizing or identifying his property; he is without remedy or redress, unless this court will cause the state of Georgia to do him right in the premises.

Wherefore the libellant prays the court to award *admiralty process* against the state of Georgia, to be issued and served as the court may direct, citing the said state of Georgia, as well as all others concerned, to show cause why the proceeds of the said slaves, paid into the treasury of the said state, should not be paid over to the libellant; the slaves remaining in the possession of the state restored to him; a just and reasonable compensation decreed to him for the slaves, converted to her own

use, or otherwise taken by the state; and such other damages allowed to him as the owner of the slaves, as the court might think proper, against the state of Georgia, &c.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

The case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state.

GEORGE W. WARD, AND RICHARD K. CALL, REGISTER AND RECEIVER (U. S.), APPELLANTS v. LEWIS GREGORY.

SAME, APPELLANTS v. JACOB ROBINSON AND F. SWEARINGEN.

A mandamus was issued by the superior court of appeals of the eastern middle district of Florida, directed to the register and receiver of the western land district of Florida, commanding them to permit the entry and purchase of certain lands. From this proceeding, the register and receiver appealed to this court. The appeal was dismissed; the proceeding at mandamus being at common law, and therefore the removal to this court should have been by writ of error.

APPEALS from the court of appeals for the territory of Florida.

Mr White moved to dismiss these cases, on the grounds that the proceedings were at law in the courts of the United States for the territory of Florida, and that they had been brought up from the court of appeals of that territory, by appeals instead of by writs of error.

On the 13th December 1826, on the application of the appellees to the superior court of appeals for the middle district of Florida, a mandamus was issued directed to George W. Ward, the register of the western land district of Florida, and to Richard K. Call, receiver of public moneys in said district, commanding them to permit the persons praying for the mandamus to enter and purchase certain sections of land, described in the writ, under the provisions of the act of congress of the 22d of April 1826, which gave rights of pre-emption in the purchase of land to certain settlers in the states of Alabama and Mississippi, and the territory of Florida. From the superior court, the case was removed by a writ of error, to the court of appeals for the territory of Florida; and, on the 21st of January 1831, the order of the superior court was affirmed by the court of appeals. From this judgment the United States appealed to this court.

The court ordered the appeal to be dismissed; the proceedings by mandamus being at common law, and therefore the cases should have been brought up by writs of error.

Ex parte Martha Bradstreet, in the matter of Martha Bradstreet, demandant.

Mandamus. In the district court of the northern district of New York, writs of right were prosecuted for lands lying in that district, and neither in the writs, or in the counts, was there an averment of the value of the premises being sufficient in amount to give the court jurisdiction. The tenants appeared, and moved to dismiss the cause for want of jurisdiction; which motion was granted. Subsequently, the demandant moved to reinstate the cases and to amend, by inserting an averment that the premises were of the value of five hundred dollars; which motion was denied by the court. The demandant also moved the court to compel full records of the judgments and orders of dismission, and of the process in the several suits, to be made up and filed, so that the demandant might have the benefit of a writ of error to the supreme court, in order to have its decision upon the grounds and merits of such judgments and orders. The district court refused this motion. On a rule in the supreme court for a mandamus to the district judge, and a return to the same, it was held, that the refusal to allow the amendment to the writ and count, by inserting the averment of the value of the property, was not the subject of examination in this court. The allowance of amendments to pleadings is in the discretion of the judge of the inferior court; and no control over the action of the judge in refusing or admitting them will be exercised by this court. The court granted a mandamus requiring the district judge to have the records of the cases made up, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court.

In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States has been, to allow the value to be given in evidence.

This court will not exercise any control over the proceedings of an inferior court of the United States, in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts; but every party in such courts has a right to the judgment of this court in a suit brought in those courts, provided the matter in dispute exceeds the value of two thousand dollars.

AT the January term of this court in 1832, on the motion of Mr Jones, counsel for the demandant, the court granted "a rule on the district judge of the district court of the United States for the northern district of New York, commanding him to be and appear before this court, either in person or by an

attorney of this court, on the first day of the next January term of this court, to wit on the second Monday of January, anno Domini 1833, to show cause, if any he have, why a mandamus should not be awarded to the said district judge of the northern district of New York, commanding him,

"1. To reinstate, and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises thereon joined, lately pending in said court, and said to have been dismissed by order of said court, between Martha Bradstreet, demandant, and Apollos Cooper et al. tenants.

"2. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court, in the several suits aforesaid.

"3. Or if sufficient cause should be shown by the said judge on the return of this rule, or should otherwise appear to this court, against a writ of mandamus requiring the matters and things aforesaid to be done by the said judge; then to show cause why a writ of mandamus should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismission in the several suits aforesaid, and of the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders upon writs of error; such records showing upon the face of each what judgments or final orders dismissing, or otherwise definitively disposing of said suits, were rendered by the said district court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said demandant, or on her behalf, to the judgments or decisions of the said district court in the premises, or to the motions whereon such judgments or decisions were found; and what motion or motions, application or applications, were made to said court by the demandant, or on her behalf, and either granted or overruled by said district court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially, what motions or applications were made by said demandant or on her behalf to said district court, to be admitted to amend her counts in the said suits, or to produce evidence

to establish the value of the lands, &c. demanded in such counts, together with all the papers filed, and proceedings had in said suits respectively." 6 Peters, 774.

The honourable Alfred Concklin, judge of the district court of the United States for the northern district of New York, appeared before the court, by Mr Beardsley his counsel; and, in pursuance of the rule, made the following statement as a return thereto.

"To the supreme court of the United States. In answer to a rule granted by your honourable court, the certified copy whereof, hereunto annexed, was on the 21st of December instant served upon him, the undersigned begs leave respectfully to state, as follows:

"1. That after the mises had been joined in the several causes mentioned in the rule, motions were made therein on the part of the tenants that the same should be dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute; and that it did not therefore appear by the pleadings that the causes were within the jurisdiction of the court. In conformity with what appeared to have been the uniform language of the national courts upon the question, and his own views of the law; and in accordance especially with several decisions in the circuit court for the third circuit (see 4 Wash. C. C. Rep. 482, 624), the undersigned granted these motions. Assuming that the causes were rightly dismissed, it follows of course that he ought not now to be required to reinstate them, unless leave ought also to be granted to the demandant to amend her counts.

"2. After the dismissal of these causes as above stated, motions were made therein on the part of the demandant, that the same should be reinstated, and that she should be permitted to amend her counts. These motions the undersigned considered it to be his duty to deny; and he can, perhaps, in no other manner more properly show cause why he should not now be required to do what he then refused to do, than by here inserting a copy of the opinion which he delivered upon that occasion. This opinion is as follows:

"'This cause having at a former term of the court been dismissed upon the ground that it did not appear upon the face of the demandant's count, that the case was one to which the

jurisdiction of the court extends, a motion has been made by the demandant, for leave to amend her count, and that the cause be reinstated in court. There are also a great number of other causes brought by the same demandant, standing in exactly the same predicament, and depending, of course, upon the decision of this. The question is therefore important, and by no means free from difficulty. Under these circumstances, and ample time having been afforded to the parties for thorough investigation, it was expected that the question would have been more fully and satisfactorily argued. It is incumbent upon me however now to decide it; and I shall proceed to perform that duty. The defect in question is clearly one in substance. It consists in the want of any averment in the count of the value of the land in dispute, an allegation, without which the court will not ever take jurisdiction of the cause.

"'The power of the national courts to grant amendments, depends upon the thirty-second section of the judicial act of September 24, 1789, which is as follows [this quotation is omitted as unnecessary to be here inserted]. With the exception of the last clause of this section, it is understood to relate exclusively to defects in matters of form. No proceeding in civil cases is to be rendered ineffectual by reason of any such defects; they are to be disregarded in giving judgment, except when especially set down as causes of demurrer; and are to be amended of course, without the imposition of conditions. To this extent the language of the section is also imperative. The last clause of the section however extends, in terms, to defects of every description in the process and pleadings, and confers upon the courts a discretionary power of permitting amendments therein upon such conditions as they shall direct. Without stopping then to ascertain the precise limits of this authority, it may be safely assumed that it extends to the case before the court; and the true question for decision is, whether this is a fit instance for its exercise. No affidavit has been furnished as the foundation of the motion; and I do not understand it to be pretended that there are any circumstances of a special nature, entitling the demandant to favour. Leaving out of view, therefore, for the present, a peculiarity affecting

the case which will be noticed in the sequel, the application presents the naked question, whether, as a general rule, the demandant in a writ of right ought to be allowed to amend a defect in substance.

"'It is wholly unnecessary to refer to adjudications in the English common pleas (in which court alone this action is cognizable in that country), to show how such an application would be there decided. No one in the least degree conversant with the settled usage of that court in this respect, can doubt that it would, without a moment's hesitation, be denied. But as one of the reasons for the great strictness which prevails in England (viz. the long period of limitation against this action), does not exist in an equal degree here, and as it is contended that this difference would of itself warrant a relaxation of the rules which govern there, it is important to advert to a few of the English decisions, in order the more clearly to perceive to *what extent* this court would be obliged to depart from them, to permit an amendment in the present case. In the case of Charlwood v. Morgan, 4 Bos. and Pull. 64, a motion was made to amend the mistake of a Christian name in the count, founded upon an affidavit accounting for the mistake. The motion was however denied, upon the ground that there was no precedent to warrant such an amendment: the court at the same time declaring that they should have been willing to amend had not the case before them been a proceeding by writ of right. The demandant then asked leave to discontinue; but this was also refused. In the case of Maidment v. Jukes, 5 Bos. and Pull. 429, a sidebar rule to discontinue having been entered, the court ordered it to be set aside with costs.

"'And in the very recent case of Adams v. Radmay, 1 Marsh. 602, a motion was made, on the part of the demandant, for leave to quash the writ of summons to the four knights, on the ground that no previous notice of executing it had been served on the tenant's attorney. The application, it was urged, was made in the demandant's own delay, *ex majori cautela;* lest it should be objected that the tenant would have a right to challenge the four knights. But the motion was denied: Lord Chief Justice Gibbs declaring the rule adopted on consi-

deration to be, that the court will not assist a demandant in a writ of right in getting over any difficulties that may occur to him. And the other judges concurred in what he said.

"'To this brief reference to English cases, I will only add, that as far as I have been able to discover, the records of English jurisprudence furnish no instance of a successful application by the demandant in a writ of right to amend.

"'If then, in England, a demandant is not allowed to amend a mistake, even in a simple Christian name, though satisfactorily accounted for, if he is not permitted to quash his own proceeding to enable him to correct a slight informality, nor even to discontinue his own suit; if, in short, no aid whatever will be granted in any difficulty into which he may have the misfortune to fall; it is clear that to permit the amendment now applied for, would not only be a wide departure from the established rule in that country, but an unqualified rejection of it; for it would be placing the writ of right in this respect upon a footing of perfect equality with the most favoured actions. Still, however, could I find myself warranted in such a course by the decisions of the supreme court of this state, I should not hesitate to pursue it; though this is one of those questions upon which the decisions of the state courts are not deemed obligatory upon the national courts. But the only case of this nature in our own courts, referred to upon the argument, or which I have been able to find, is that of Malcolm v. Roberts, reported in 1 Cowen, 1. In that case the sheriff, in his return to a writ of right, had stated that he had made proclamation at the most usual door of the episcopal church in Beekman street, called St George's chapel, in the second ward of the city of New York, within which the tenements lay. The tenant having been called on the *quarto die post*, it was objected that the return was defective under the statute of this state, although in exact conformity with the English form of a return; in not stating that the church mentioned in the return was the *nearest* church to the tenements in question. The court having, after advisement, held the objection to be well taken, the question was, whether the sheriff should be permitted to amend his return in this particular, it being admitted that the church at which the proclamation was made, was in fact the nearest to the tenements, and that the proceeding in itself had therefore

been correct. It certainly is not easy to fancy a more favourable case than this for amendment, but I well remember the strenuous and very protracted argument to which the court deemed it their duty to listen before they determined to grant the application.

"'It does not appear that any such case has arisen in England, nor does it by any means follow from the decisions of the common pleas, that even there such an application would be denied. Indeed, it is said in one of the cases above cited, that there might possibly arise a case in which an amendment would be permitted. The case of Malcolm v. Roberts, therefore, which I have already said is a solitary one in this state, does not warrant the conclusion that the strictness of the English practice in this respect had been relaxed; much less that it has been wholly repudiated here. It is true that one of the judges in that case remarked, that the ancient strictness which prevailed in real actions had been much relaxed by the late decisions; and as evidence of such a change he stated, that he recollected a case in which, at the last term of the court, a default and grand cape having been taken, the default was set aside. I have searched for this case, but it does not appear to have been reported. But (admitting, which does not appear, that the case referred to by his honour was a writ of right), it is to be observed, that in that case it was the *tenant*, and not the demandant, who applied for relief. The indefatigable reporter, however, whose well known and useful practice it was to collect all the important decisions tending to confirm or illustrate the point decided, cites, in a note, the case of Van Bergen v. Palmer, 18 Johns. 504, in which the default of the demandant for not appearing upon the call of the tenant, was set aside upon an affidavit satisfactorily excusing the default. But this, upon examination, turns out to have been an action of *dower;* an action favoured in law, and to which less strictness has been applied. However the fact may be, therefore, it no where appears, as far as I have been able to discover, except in the dictum in Malcolm v. Roberts, above mentioned, that the ancient strictness against the *demandant in the writ of right* has been relaxed, even here: while it is abundantly evident from the recent case of Adams v. Radmay, cited above, (the latest case which I have found),

that no such relaxation has taken place in England. The writ of right is an ancient common law remedy, injudiciously adopted here, with all its cumbrous machinery and useless appendages; and in the absence of any authority for so doing, I fear I should hardly be warranted in denying that its peculiar disadvantages were also adopted along with it; and that he who chooses to resort to it, must be content to take it with all its imperfections on its head.

"'But there is a peculiar feature in this case which remains to be noticed, and which ought not to be without influence upon its decision. By a recent statute of this state, the remedy by writ of right is wholly abolished. The present action was commenced *after the enactment* of this law, and just before it went into operation. Whatever room there may have been, therefore, before the passage of this act, for doubting whether this action ought to be viewed by our courts in the light in which it has already been regarded in England, as one by no means entitled to favour, but to be discouraged; no such doubt can now exist, since it has been abolished as an evil which ought no longer to be tolerated. But this is not all.

"'I apprehend it may safely be assumed, that this act, taken in connexion with the rule of this court adopting the practice of the supreme court of this state, is to be regarded as applicable to this court; so that no new action by writ of right can now be prosecuted in this court. If this be so, it becomes a serious question whether this, of itself, does not, upon authority, constitute an insuperable objection to this application. By the dismission of the cause, the demandant has lost the power of further prosecuting it; and the application now is, first, for leave to insert in the court an allegation indispensable to her right of recovery in this court; and second, that the cause be thereupon reinstated, without prejudice in court. Now, there is no action in which the courts have been more liberal in permitting amendments than that of ejectment; insomuch, that it has been the uniform practice of the courts of England, as well as in this state, to allow new demises to be added, even after the lapse of several years.

"'By an act of the legislature of this state, passed in 1813, suits against bona-fide purchasers for the recovery of military bounty lands, were required to be commenced be-

at the last term, requiring the judge of the district court to show cause why a mandamus should not issue to compel him,

1. To *reinstate and try* these causes, &c.

2. To permit such amendments to be made in the pleadings as may be necessary to aver jurisdiction.

3. Or to require records to be made up and filed, so that this court may bring up the judgments by writ of error, &c.

To this rule the judge has answered, and has presented the statement which is filed.

1. The first inquiry is, did the court below decide right in refusing to permit the amendment to be made?

The defect is one of *substance*, not of *form;* and it is not therefore amendable *of course*. 1 Paine, 486. It might, perhaps, well be doubted whether a court can, in any case, amend in a matter necessary to give jurisdiction. It is, however, believed, that a different rule has prevailed in the courts of the United States, and therefore the proceeding will not, at this time, be called in question.

It is then assumed that the court below had power to make this amendment. It also had power to refuse to make it. No special grounds were shown for granting these applications to the court below: no affidavit, in fact, was presented as a foundation for the motion. Would the court grant it without affidavit? proof? It was in the discretion of the court.

Has a demandant, in a writ of right, *a right* to amend of course, on mere motion, without showing any cause, in a matter of substance? 1 Paine, 492. The answer of the judge cites the authorities. 4 Bos. and Pull. 64; 5 Bos. and Pull. 429; 1 Marshall, 602; 1 Cowen, 1.

There is a further objection. Before these causes were commenced, a statute was passed in New York abolishing writs of right, after a certain day, and which day arrived before the motions to amend were made. When the motions to amend, therefore, were made, such actions could not be brought in New York in its own courts. That statute was equally applicable to the district court; so that no writ of right could *then* be prosecuted in that court.

This was a good objection to the amendment. The amendment would have been an evasion of the statute abolishing writs of right: it would, in effect, have given an action which

had been abolished,—virtually repealing the statute. Cited by the judge, 1 Cowen, 156; 2 Durn. and East, 707, 708; 6 Durn. and East, 171, 548; 17 John. 346.

It is submitted that the district judge, in refusing to allow the amendments, decided correctly. But if he did not, this court will not proceed by a mandamus to correct his errors. Such a proceeding is not an exercise of original jurisdiction; and if it is the employment of the appellate power of this court, it cannot be used in this form. Congress may extend the powers of this court to any cases under the constitution of judicial cognizance; but they have not given the power by proceedings for a mandamus to examine into the action of the inferior courts in matters of this description. The power to issue a mandamus exists under the fourteenth section of the judiciary act of 1789, and it does not comprehend this case. The writ of mandamus is never used for such purposes.

It does not lie to control or coerce the discretion of a subordinate tribunal. 1 Wend. 299; 1 Cow. 423; 2 Cow. 458, 483; 6 Cow. 393; 7 Cow. 363, 523; 1 Paine, 453.

No doubt is entertained of the power of this court to award a mandamus for the *last* purpose indicated in the rule; that is, *to compel records to be made up and filed.* 1 Paine, 455. This court may review the judgments of the district court by writ of error. But no such judgment can be brought up until a record has been filed.

This court may compel such record to be filed. That power is "necessary," to enable this court to exercise its jurisdiction by writ of error. The writ of mandamus is, for that purpose, "agreeable to the principles and usages of law." This court then, for that purpose, may award it. For that purpose the parties interested in this case have no objection that it should issue.

What will it bring up? A judgment of the court dismissing the cause for want of jurisdiction. If that judgment was correct, it must be affirmed. Let it be brought here if the demandant asks it. Whether it is a *final* judgment, has not been examined; nor is it regarded as material. Perhaps, however, the better opinion is, that it is not a final judgment.

Judgments of nonsuit cannot be removed by writ of error.

3 Dall. 401; 4 Dall. 22; 4 Wheat. 73; 5 Cranch, 280; 7 Cranch, 152.

On a writ of error to an inferior tribunal, which had given a judgment on the merits, if it appears from the pleadings that the court below had no jurisdiction, this court cannot award a venire de novo. 3 Dall. 19. Then why require a record to be made out? These matters are stated not as objections; for none are made, if these were in fact final judgments. So far the jurisdiction of this court is conceded.

But it may perhaps be said on the other side, that the judgments which have been rendered are not *final* judgments; and therefore not removable by writ of error. That it is therefore proper to compel the court to reinstate and try the causes, to the end that *final* judgments may be rendered. 6 Wheat. 601, 602; 6 Peters, 657; 2 Laws U. S. 64, 22.

For what end reinstate, try and determine them? If judgments should pass in favour of the demandant, they would be erroneous. She therefore cannot desire such judgments. The pleadings being defective, and fatally so; she cannot possibly have a valid judgment on them. If rendered in her favour it would be erroneous: if rendered against her, she could not reverse it. No venire de novo could be awarded in such case. 3 Dall. 19.

But if this court may compel the court below by mandamus to reinstate and try the causes, and render *final* judgments therein; yet it cannot, as it is supposed, compel that court to grant the *amendments* asked for. The judgments will be just as *final* without as with the amendments.

It has already been said that a mandamus does not lie to coerce the *discretion* of a subordinate tribunal. Now it is insisted that it was *discretionary* with the court below to make, or refuse to make this amendment. That the question was for that court *alone*, and that it cannot be controlled here.

Under the act of congress, amendments, like the one in question, are not demandable of right.

1. The judiciary act of 1789 (sect. 32), in its first clause, declares that no summons, &c. shall be abated, &c. "for any defect or *want of form*." But this is not a *formal* defect, it is one of *substance*.

2. That section declares that the court *may* amend *any* defect upon such conditions as the court, in *its discretion*, shall prescribe. This section gives perhaps full power to the court below to make the amendment. But it is to be made *on condition;* such condition as the court *in its discretion* shall prescribe.

Permitting amendments is a matter of discretion. Cited, 5 Cranch, 17, 2 Peters's Cond. Rep. 175; 6 Cranch, 267, n.; 6 Cranch, 217, 2 Peters's Cond. Rep. 351; 9 Wheat. 576; 11 Wheat. 280; 3 Peters, 32; 6 Peters, 656; 1 Paine, 456, 457.

The court below therefore is not compellable by mandamus to allow them.

It is then submitted to the court:

1. That the court below decided correctly in refusing the amendment—it being a writ of right. It would not have been made in England. It should not have been made when moved, as no writ of right could *then* have been prosecuted in New York.

2. It was not at all courts a matter resting in the discretion of that court, which cannot be controlled by a mandamus.

Mr Jones, for the defendant.

Mr Chief Justice Marshall delivered the opinion of the Court.

After hearing counsel, and considering the cause shown by the honorable the judge for the court of the United States for the northern district of New York; this court is of opinion that it ought not to exercise any control over the proceedings of the district court in allowing or refusing to allow amendments in the pleadings; but that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars.

In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States, is, to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, at or before the trial of the cause; and would

have a right to give it in evidence in this court. Consequently he cannot be legally prevented from bringing his case before this tribunal. The court doth therefore direct that a mandamus be awarded to the judge of the court of the United States for the northern district of New York, requiring the said judge to reinstate, and proceed to try and adjudge according to the right of the case, the several writs of right, and the mises thereon joined, lately pending in said court, between Martha Bradstreet, demandant, and Apollos Cooper et al. tenants.

The following mandamus was issued by order of the court.

United States of America, ss.

To the honourable Alfred Concklin, judge of the district court of the United States for the northern district of New York, greeting:

Whereas, one Martha Bradstreet hath heretofore commenced and prosecuted, in your court, several certain real actions, or writs of right, in your court lately pending between the said Martha Bradstreet, demandant, and the following named tenants severally and respectively, to wit, Apollos Cooper and others [naming them]. And whereas, heretofore, to wit, at a session of the supreme court of the United States, held at Washington on the second Monday of January in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court, upon the several motions of the tenants aforesaid, were dismissed for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant in the several counts filed and exhibited by the said demandant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of said demandant: whereupon the said supreme court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said supreme court, should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right aforesaid, and the mises therein joined. And whereas, at the late sess-

ion of the said supreme court held at Washington on the second Monday of January in the year 1833, you certified and returned to the said supreme court, together with the said rule, that after the mises had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be dismissed upon the ground that the counts respectfully contained no allegation of the value of the matter in dispute, and that it did not therefore appear, by the pleadings, that the causes were within the jurisdiction of the court: that, in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the circuit court for the third circuit (see 4 Wash. C. C. Rep. 482, 624), you granted their motions; and assuming that the causes were rightly dismissed, it follows of course that you ought not to be required to reinstate them, unless leave ought also to be granted to the demandant to amend her counts: and whereas, afterwards, to wit at the same session of the said supreme court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rule's being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the arguments of counsel, as well on your behalf, showing cause as aforesaid, as on behalf of the said demandant, in support of the said rule, it was considered by the said supreme court, that you had certified and returned to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said supreme court being of opinion, and having determined and adjudged upon the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the said supreme court, and of the courts of the United States, is to allow the value to be given in evidence: that, in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence

in the said supreme court; consequently that she cannot be legally prevented from bringing her cases before the said supreme court; and it was also then and there considered by the said supreme court that the peremptory writ of the United States issue requiring and commanding yon, the said judge of the said district court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid: therefore, you are hereby commanded and enjoined, that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that complaint be not again made to the said supreme court; and that you certify perfect obedience and due execution of this writ to the said supreme court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then there this writ.

Witness the honourable John Marshall, chief justice of said supreme court, the second Monday of January in the year of our Lord one thousand eight hundred and thirty-three.

W. T. Carrol,

Clerk of the supreme court of the United States.

THE STATE OF RHODE ISLAND, COMPLAINANT v. THE STATE OF MASSACHUSETTS.

MR ROBBINS, solicitor for the complainant, having renewed his motion of last term in this case, prayed the court to award such process, and in such form, as the court may deem proper.

On consideration of the motion made in this case, it is now here ordered by the court that process of subpœna be, and the same is hereby awarded as prayed for by the complainant, and that said process issue against "The commonwealth of Massachusetts."

APPENDIX

No. I.

Charge of Judge Hopkinson, in the case of The lessee of Edward Livingston and others v. John Moore and others. *See ante, page 477.*

The argument of this cause has been spread over a wide surface; and matters introduced into it, by way of illustration or otherwise, which have greatly increased its proper size and difficulties. The magnitude of the interests at stake, and the high principles which have been discussed, have excited extraordinary exertions from the able and distinguished counsel who have appeared before you. These are the rights and duties of the counsel. It is the business of the court to select from the great mass, the matter most worthy of your attention, and to put it before you in as plain and simple a shape as it will admit of.

Such will be my object on this occasion; and I trust that both you and I will enter upon our duties, and endeavour to perform them, with a single eye to the authority of the laws, which we are bound to obey, and which we are placed here to maintain. If the state to which we belong has fallen into an error, and injured one of her citizens by an illegal and unauthorised act of legislation, it is here that the error must be corrected, or the wrong will be perpetual. On the other hand, we are not to deal lightly with the power and rights of a state; or to overthrow her most solemn acts in a spirit of wantonness, or in the indulgence of speculative theories and ingenious refinements. The facts of this case, supported by documentary testimony, are before us, with no contrariety in any thing material; and it is our duty to seek for the law which governs them, and so pronounce our judgment between the parties.

The title of the plaintiffs to the land in question is derived from John Nicholson; who, in the year 1794, purchased it from the commonwealth. By an agreement made between the parties in this case, it is stated that "as both parties claim under John Nicholson, the title to the premises shall be admitted to have been in him, unless divested by the alleged lien and proceedings of the state of Pennsylvania." The defendants also claim title from the same John Nicholson. They purchased their lands severally under the alleged lien and proceedings of Pennsylvania; and bought them from the state, as the property of John Nicholson: and "as and for such estate as the said John Nicholson had and held the same at the time of the commencement of the lien of the commonwealth against the estate of the said John Nicholson." By this clause in the act of assembly directing the sales, the original contract between the commonwealth and John Nicholson is recognized and affirmed, his right and property in the lands admitted; and the commonwealth undertook to sell to the purchasers, the present defendants, only such estate as John Nicholson held in them.

Both parties then claim to have the title and right in these lands, which John Nicholson once held, and the question now to be decided is—which of them has made good his claim; which of them has proved and maintained his right by the facts of the case, and the law of the land.

The original title being admitted to have been in John Nicholson, his heirs, who claim immediately from him, have and hold his rights, "unless they have been divested by the alleged lien and proceedings of the state of Pennsylvania, under which the defendants have title."

This simple view of the case brings us at once to the question we have to examine, to wit:—Have the lien of the state on this property, and the proceedings of the state to enforce that lien, divested John Nicholson and his heirs of the title and estate he once had in it; and have the title and estate of John Nicholson become vested in the defendants by virtue of that lien and those proceedings?

In pursuing this inquiry, our first step must be, to trace this lien and these proceedings from their origin to their termination; and examine whether they have brought these lands which John Nicholson once held, lawfully and rightfully in the possession of the defendants, with all the title John Nicholson had to them. If they have not done so, the defendants stand without title; they pretend to no other; the original rights of John Nicholson in the land are unchanged by these proceedings, and the plaintiffs now holding those rights, are entitled to recover.

We must turn a careful attention to some of the laws of the legislature of Pennsylvania, and settle their meaning and effect, before we consider the various acts that have been done under them. The foundation of the title of the defendants is found in the twelfth section of the act of 18 February 1785. It enacts "that the settlement of any public account by the comptroller-general, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all real estate of such person throughout this state, in the same manner as if judgment had been given in favour of the commonwealth for such debt in the supreme court." This act, 1. Gives a lien in favour of the commonwealth, upon all the real estate of any person who shall be found to be a debtor to the commonwealth, in any balance or sum of money, by a settlement of his account by the comptroller-general, confirmed by the executive council. 2. This lien is to attach to the estate in the same manner as if a judgment had been given for the debt in the supreme court.

I have not been able to satisfy myself of the meaning of the legislature in this last phrase—"in the same manner as if a judgment had been given in the supreme court." It is true that at the time when this act was passed, a judgment in the supreme court extended its lien over the whole state; but as the act had previously declared that the lien under it should be on all the real estate of the debtor, *throughout the state*, we must presume something more was intended by the subsequent clause.

The defendants contend, that by the words, "in the same manner," &c., the legislature intended that a purchaser under this lien should hold the land in the same manner as a purchaser under a judgment; and have the same protection against a subsequent reversal for any errors in the proceedings antecedent to the lien. If this construction be the true one, it will greatly abridge our inquiries in this cause. It closes up all the objections of the plaintiffs to the settlement of the accounts; and ratifies every irregularity, if there be any, prior to the lien. It therefore becomes necessary to examine, and, as far as we can, determine what was the meaning of the legislature in using these words—"shall be deemed and adjudged to be a lien on all the real estate of such person, throughout this state, *in the same manner as if a judgment had been given* in favour of the commonwealth against such person, for such debt in the supreme court." Did they mean to say that a sale made under a lien, in such manner as might afterwards be directed, for

this act made no provision for a sale, should have the same protection or immunity from errors, as was given by the law of 1705 to sales by execution under a judgment. I have suggested already, that while the act of 1785 gives to the settlement of an account the effect of a lien by judgment, it provides no mode of proceeding by which the lien is to be enforced, or the money secured by it collected. I cannot but infer from this that it was the intention of the legislature to make the debt secure by the lien: but that it was to be recovered and collected in the ordinary way of a suit, a judgment and an execution; the settlement being conclusive evidence of the debt. If this be so, then as the sale would also be by a venditioni by virtue of the judgment and levy, the purchaser would of course receive the deed of the sheriff, and have all the protection given by the ninth section of the law of 1705 to such a sale. In this view of the act no provision was necessary for the security of the purchaser, and therefore none can be intended by the words in question.

Again, the lien is given in the same manner as if a judgment had been given in the supreme court. Now a judgment in the supreme court had no special privilege or rights in this respect; but a purchase under a judgment in any other court had the same protection from disturbance in case of a reversal of the judgment as if it had been rendered in the supreme court. On comparing the twelfth section of the act of 1785, with the ninth section of that of 1705, it will be found very difficult to connect them in the manner contended for by the defendants. By the law of 1785, the lien is put on a footing with a *judgment* and no more. Now the provision of the law of 1705, has no reference to the judgment, but the sale made by the sheriff, by virtue of the levy, condemnation and venditioni exponas issued from the court. It is the *sale* which is not to be avoided by a reversal of the judgment, but the purchaser is confirmed in his right and title to the land, and its former owner, the defendant, can demand a restitution only of the money for which it was sold. If the act of 1785 had authorized an execution to issue, on the settlement which in truth is the substitute for the judgment as regards the debt, or a sale to be under any process to satisfy it in the same manner as a sale under a judgment, the conclusion might have been fairly made that the purchaser at such a sale would stand as secure in his title as a purchaser under a judgment.

From 1785 to 1806, no provision was made to enforce the payment of the money received by the lien in any other way than by a judgment and execution to be obtained as for any other debt. In 1806, an act was passed specially for the case of J. Nicholson, leaving the collection of the debts due from all other persons to the commonwealth, still to be made in the ordinary way. In the case of J. Nicholson, for reasons very apparent on the face of the act, the legislature provided a proceeding "for the more speedy and effectual collection of certain debts due to this commonwealth," by which and another act passed in the following year a sale was ordered to be made by commissioners, as in the manner prescribed by the acts, of the lands of J. Nicholson, subject to the lien of the commonwealth." This sale differs in many respects from that authorized by the law of 1705, by virtue of a judgment and execution. The lands are to be sold absolutely, and not, as in the other case, only "where a sufficient personal estate cannot be found." No inquisition is to be held to ascertain the annual value of the land; and in other matters, it is wholly unlike a sheriff's sale; why then shall we say it is to have the effect of a sheriff's sale, in this particular, which effect is expressly given to that sale by the law which authorizes the sale in question. I am inclined to think this redundancy of expression is but a pleonasm which may occur in legislative compositions as in other works of the pen.

The full and perfect validity of this act has not been questioned—nor could be. Every government assumes, and rightfully has, the power to take care of its own revenue, to protect it by extraordinary securities, to collect it by extraordinary remedies. Without this power, and liberal exercise of it, the government might

be thrown into ruinous embarrassments, and distressing disappointments, and delays in meeting the expenses of the public service. The United States by act of congress are entitled to a preference in certain cases, over all other creditors, and even a judgment will not protect a creditor from the extraordinary right of the government for the payment of an ordinary debt.

We proceed then on the undisputed ground, that the state of Pennsylvania has taken to herself no illegal nor unusual advantage by the enactment of the twelfth section of the law of 1775, but that any balance or sum of money due from any person, ascertained and settled in the manner therein prescribed, "shall be deemed and adjudged to be a lien on all the real estate of such person throughout the state."

You have observed that the settlement of the account to which the lien is given must be confirmed by the supreme executive council. This was in 1785; in the year 1790, the people of Pennsylvania made for themselves a new constitution, or form of government, and thereby the executive power of the commonwealth was vested in the governor; and the executive council of course ceased to exist.

Many acts of legislation became necessary to accommodate the laws of the state to the new government. Among others to vest in the governor the power of the executive council. On the 13th April 1791, a general act was passed which enacted that the governor of the commonwealth shall have and exercise all the powers that by any law or laws were vested in the supreme executive council. The duration of this act was limited to the 1st of August following. On the 21st of September 1791, the act of April was continued to December, and in the law of September we find the following provision—"that in all cases where accounts examined and settled by the comptroller-general and register-general, or either of them, have heretofore been referred to the executive authority, to be approved and allowed, or rejected by the governor, the same shall *only* for the future be referred to the governor, *when the said* comptroller-general and register-general *shall differ in opinion;* but in all cases *when they agree, only the balances* due on each account shall be certified by the said comptroller-general and register-general to the governor, who shall thereupon proceed in like manner, as if said accounts respectively had been referred to him according to former laws upon the subject. And provided also, that in all cases when a party or parties shall not be satisfied with the settlement of their respective accounts by the comptroller-general and register-general, or when there shall be reason to suppose that justice had not been done to the commonwealth, the governor may and shall, in like manner, and upon the same condition as heretofore, allow appeals, or cause suits to be instituted, as the case may require."

The meaning and construction of these provisions have formed a prominent subject of the discussion you have heard. It is my duty therefore to give you my views of it. We must go back for a moment.

By the law of 1782, great powers were given to the comptroller-general, in the settlement of accounts; and no appeal was allowed from his decision, or any means given by which a party aggrieved by his settlement could bring his case before the court and jury upon its facts or its law. To remedy this injury and injustice, the act of 1795 was passed. It enacts that wherever the comptroller-general shall settle an account in pursuance of the previous law and transmit it to the executive council for their approbation, if the party be dissatisfied, he may, within one month after notice given to him by the comptroller, appeal to the supreme court on certain terms not now material.

The sixth section of the law of 1785 directs, that if the council be dissatisfied with the settlement made by the comptroller, they may direct a suit to be instituted against the party, with whose accounts they may be dissatisfied. This brief recurrence to previous laws will aid us in understanding the acts of September 1791, with one additional reference. On the 28th March 1789, an act was passed for the appointment of a register-general, and the comptroller is required to submit all

the accounts he shall adjust, before he shall finally settle them, to the examination of the register-general, and take his advice and assistance in making such settlement; and the settlements made by the comptroller with the aid and assistance of the register, are to be laid before the executive council. Afterwards by a law of April 1790, all accounts are ordered, in the first instance, to be submitted to the register, and after his liquidation and adjustment to be transmitted to the comptroller for his examination and approbation, who shall in like manner transmit them to the executive council for their *final approbation*. Thus we see that antecedent to the law of September 1791, the course of settling an account with the comptroller was: 1. To have it examined and adjusted by the register-general. 2. By the comptroller-general. 3. By the supreme executive council, and was not considered to be a *final settlement* until it was examined, adjusted and approved by all these tribunals. All the rights of appeal by the party, and of a suit by the executive on behalf of the commonwealth, remained as they were given by the act of 1798.

We now come to the act of September 1791, and the changes effected by it in the settlement of public accounts. In the first place it enacts that the reference of the *accounts* to the governor, or executive power, to be by him *approved* and *allowed* or rejected, shall in future only be made, when the comptroller and register shall differ in opinion. When they agree, the *accounts* are not to be transmitted to the governor, or in any manner referred to him for his approbation or rejection, but the register and comptroller are required to *certify* to the governor only the *balances* due on the one side or on the other on each account. It is, however, provided that if the party shall be dissatisfied with the settlement, he shall have an appeal in like manner and upon the same conditions as heretofore; and so on the other hand, if the governor shall suppose that justice has not been done to the commonwealth he may cause a suit to be instituted against the party, and in either case the whole account will be investigated and recommended by a court and jury. But if the party does not take his appeal in the manner prescribed, and the governor does not cause a suit to be instituted, both the commonwealth and the party are presumed to acquiesce in the settlement made by the register and comptroller, and it is finally conclusive upon both.

Such was the law of the commonwealth for the settlement of public accounts, when the account of J. Nicholson, now before the court, was adjusted and settled.

We are now prepared to approach the question of *lien*. The right of a commonwealth to a lien on all the real estate, throughout the state, of any person for the sum or balance found due, being given by the law of 1785, we have to inquire whether such a balance or sum of money was found due from J. Nicholson to the commonwealth, in such manner and form as to give this lien to the commonwealth on all the real estate of J. Nicholson throughout this state for such balance or sum. In other words, were the accounts of J. Nicholson with the commonwealth, so settled, according to the laws of this state, and the balances or sums alleged to be due from him so found, as to entitle the commonwealth to the lien given by the twelfth section of the act of 1785. Was there, on the 31st of March 1806, when the act was passed "for the more speedy and effectual collection of certain debts due to this commonwealth;" was there a debt due from J. Nicholson to the commonwealth; and was there a valid and subsisting lien on his real estate for the security and payment of that debt?

The defendants allege the affirmative of both these questions. And they rest their proof, 1. On the settlement of certain accounts of J. Nicholson, in 1796. 2. On two judgments rendered against him by the supreme court of the state in favour of the commonwealth: one on the 18th of December 1795, the other on the 21st of March 1797.

1. The accounts.

Three having been laid before you, and they were produced by the plaintiffs in the opening of the case, I shall take them in their order of time.

1. An account which affirms on the face of it to have been settled and entered in the office of the comptroller-general on the 3d of March 1796; and in the office of the register-general on the 8th of March 1796. This account is headed "Dr John Nicholson on account in continental certificates with the state of Pennsylvania, Cr." You will have it with you: it is therefore sufficient for me to say that on this account there is a balance struck against J. Nicholson of fifty-eight thousand four hundred and twenty-nine dollars and twenty-four cents.

2. An account "settled and entered" in the office of the register-general on the 20th of December 1796, and "approved and entered" in the comptroller's office on the 22d of December 1796, headed "Dr John Nicholson, account in continental certificates with the commonwealth of Pennsylvania, Cr."

The balance of the former account, fifty-eight thousand four hundred and twenty-nine dollars and twenty-four cents, is here charged to J. Nicholson. And credits are given to him which reduce that balance to fifty-one thousand two hundred and nine dollars and twenty-two cents. This balance and the former contract are stated to be carried to account on new account.

3. An account which is thus vouched by the accounting officers—"'settled and entered,' Samuel Bryan, register-general officer, 30th June 1800. December 20, 1796. N.B. This account was settled in December 1796, but not entered in the books till 30th June 1800. Also examined and entered, John Donaldson, comptroller-general officer, December 20, 1796."

This account is headed "Dr John Nicholson, account three per cent stock of the United States, in account with commonwealth of Pennsylvania, Cr."

A balance is struck against John Nicholson of sixty-three thousand seven hundred and twenty-nine dollars and eighty-six cents, carried to the new account.

As the lien of the commonwealth, by which the defendants maintain their right, as, in part, alluded to, has been created by those accounts and their settlements, they have properly attracted a particular attention from both parties, and been the subject of great part of the discussion that has been laid before you. The objections to these settlements, urged by the plaintiffs, are numerous; and I shall draw your notice to such of them as I think we may now consider. You have observed that one of these accounts has been brought before the supreme court of the state in the case of Smith v. Nicholson, reported in 4 Yates, 6. Such of the questions now raised as were clearly decided in that case, I shall not trouble you with; I shall abide by that decision, not only on account of the obligation I am judicially under to do so, but because I am entirely satisfied with it. I speak of law there settled. In that case the commonwealth claimed a priority over a private creditor of John Nicholson, who had taken in execution a tract of land as the property of Nicholson. The commonwealth maintained her claim by virtue of her alleged lien on all the real estate of Nicholson, given to her by the law of 1785, on a certain settlement of *one of his* accounts, by which the sum of fifty-eight thousand four hundred and twenty-nine dollars and twenty-four cents, made on the 3d and 8th days of March 1796, was found due to the commonwealth. This is one of the accounts and settlements on which the defendants now rely. The question submitted to the court was, whether the said settlement created any lien on the real estate of John Nicholson. We must observe that this is the account which was first settled and entered in the books of the comptroller-general; and afterwards settled and entered in the books of the register-general, which is here insisted upon to be a fatal irregularity. It is also expressly stated that the accounts were not transmitted, and received no confirmation from the governor. These facts were then distinctly presented to the court, and their opinion given on the law of such a case:

1. That the account settled was but one of the various accounts between the commonwealth and the debtor.

2. That the settlement had been made first by the comptroller and afterwards by the register.

3. That it had never been transmitted to the governor, nor received any confirmation by him. And the question submitted to the court was, whether this settlement of their account created a lien on the lands of the debtor, in favour of the commonwealth.

The court then decided,

1. That the provision in the law of 1785, which creates the lien, is not repealed by any subsequent law or laws, expressly or by implication.

2. That the settlement of the account before them, made in the manner mentioned, did create a lien on all the real estate of John Nicholson throughout the state

This decision is the law of the case as it was presented in the supreme court of the state and no further. The party here, who was not a party to that suit, has a right to the benefit of any new facts which would vary the case, if there be any such. We must therefore consider such of his objections to the settlements as were not brought into view, and have not been disposed of by the judgment of the court in the case cited.

It is alleged that John Nicholson had a legal right to notice of the intended settlement of his account; that he had no such notice, and that therefore the settlement made by the accounting officers of the commonwealth was ex parte, and had no binding force on him or his property.

This allegation as an affirmative fact, that he had no notice, is not supported by evidence or admission, as it was in Fitler's case; but the case here is, that no proof has been produced that he had notice. We come at once to these questions. Was any notice necessary to give a legal validity to these settlements? May a notice be now presumed? Is there any evidence of it, which, at this distance of time, and under the circumstances of the case, ought to satisfy us that it was given, or that, what is equivalent to it, the party attended at the settlements?

One of the plaintiffs' counsel has insisted that the notice directed by the fifth section of the law of 1782, which is, in truth, a process of summons to be issued by a prothonotary, and served by a sheriff, was such a notice as John Nicholson was entitled to. On turning to the act, it to me is extremely clear, that the notice there has no reference whatever to accounts which should afterwards arise and be settled with the treasury of the commonwealth. It applies only to certain accounts then, of long standing and unsettled or not finally closed, with persons having in their hands large sums of money or effects, belonging to the commonwealth, in danger of being lost, if "vigorous measures be not taken to compel such persons to settle their accounts, and discharge the balances which may appear to be due to the state." The comptroller is ordered to form lists or abstracts of the names and places of abode, &c. of such persons; and it is to them that the notice or summons is to be issued, to be followed by the subsequent proceedings, according to the act.

We recur to the question—was any notice required to be given to John Nicholson, of the intended settlement of his accounts? Certainly none is directed by the numerous acts of assembly which have been passed for settling the accounts of public debtors. It is nevertheless insisted that it is indispensable; and the opinion of the supreme court of the state is relied upon—Fitler's case, 12 S. & R. 278—to prove the necessity of notices, although none may be expressly directed by the act under which an account is settled. The circumstances of that case were very peculiar, showing a strong and clear equity with the defendant, not merely in the point of notice, but in the substantial merits in controversy. Great wrong had been done him in the settlement, and it was admitted by the accounting officer. What is more material, there were many expressions and provisions of the acts under which his accounts were settled, from which the court thought it was "manifest the legislature intended, in such case, that the party should have been summoned, or in some way or other have had notice." The case decided by the court was very different from this:- it is an authority only so far as they are the

same. In the acts of the legislature we have to construe, there are no such provisions as are found in Fitler's case, from which the court inferred a manifest legislative intention of notice. Some general expressions of the chief justice, in delivering the opinion of the court, are resorted to, to sustain the objection here; such as that notice to the party, "is one of the most substantial requisites of natural justice"—that "in proportion as power approaches to arbitrary discretion, it should be restrained within the limits prescribed to it by the legislature."

Again, "the word *settlement* imports a joint act of the parties who have computed together; and an *ex parte* settlement (if any thing properly be so called) is contrary to the plainest principles of natural justice." This is all true, and well applied to the case before that court, in which they thought that the proceeding of the accounting officer had not been "restrained within the limits prescribed to it by the legislature"—but it would be a bold step in this, or any other court, to pronounce an act of a state legislature, unconstitutional and void, on such general opinions and principles, however just in themselves; and without going thus far, they will avail nothing for the plaintiffs in this case. If, therefore, it were here proved or admitted, that John Nicholson had no notice of the settlements now charged upon him and his property, made by virtue of legislative acts, which it is admitted require no notice, I should not imagine myself to be authorized to pronounce the acts and proceedings of the legislature invalid; for the argument, on the subject of notice, followed out, ends in this, if it is to serve the plaintiffs: that the acts of 1806 are unconstitutional and void, because they ordered the sale of the estate of John Nicholson, by virtue of a lien created by a settlement of his accounts, which settlement was made without notice to him, and therefore gave no authority to the legislature to pass the acts in question; or that no lien was, or constitutionally could be created, by a settlement of accounts without notice to the parties, although the legislature had required no notice, and that such a settlement itself was illegal, and not binding on the party or his property. This is (supposing the notice not to be required by the laws), that the legislature had no power to direct a settlement of a debtor's accounts, nor to make the balance due on such a settlement, a lien on his property without notice. Granting this to be just—Is it a void act?

If the argument does not come to this conclusion, it does not help the plaintiffs. And can we soberly and judiciously bring it to this conclusion. Can we solemnly pronounce a law of this state to be void, because a notice was not given, when none was required, by the power having the clear right, to say whether it should be given or not? I might think notice to be a "substantial requisite of natural justice," but in a certain case, the legislature has thought otherwise; and they had a constitutional right to think so, and to act upon their own opinion of this abstract question, as well as of its application to the case they were providing for. In Fitler's case, the only question was, whether he should be charged with interest on the balance of his account, a question practically within the equity of the court, and the opinions of substantial justice. That court was not called upon on such a point, to declare a law of the state void, and to prostrate it as an illegal assumption of legislative power. No court has yet presumed to question a legislative act, on the ground of a difference with their notions of actual justice; and no legislature would, or ought to submit to such a restriction of their authority. To affect the defendant's title, on this point of notice, we must declare that the settlement and the acts directing it, are unauthorized and void, because they give no notice, and therefore created no lien, and that the acts of 1806-7 are void, because they order a sale without a settlement or lien.

If then, the legislature had a right or a power to direct a settlement of the accounts of a debtor without notice to him, and they have done so, we might dismiss this objection with the remark, that however unjust we might deem it, yet as it violates no provision of the constitution, we cannot put the judicial veto on a law

on this account. But I will proceed a little further with it. The counsel for the defendants have insisted, and are well supported by precedent, by principle and sound policy, in the administration of justice, that after a lapse of thirty-four years since these accounts were settled, a fair and legal presumption arises, that all was done which the law required to be done, or which ought to have been done, to give validity to the settlements; that it must be presumed, in the absence of all proof to the contrary, that the appointed and sworn officers of the commonwealth who settled the accounts, performed their duties with a proper regard to the rights of the other party; that the whole proceeding was regular and lawful. But allow me to call your attention to the evidence you have had of the circumstances which may at this time be considered as proof of notice, or of the attendance and acquiescence of the party, John Nicholson.

It does not seem to be questioned by the plaintiffs, that slight circumstances might now be received as proof of notice—are there not such circumstances in this case? In the first place, we have the official certificates of the register and comptroller, that these accounts were "*settled.*" If we may with the plaintiffs adopt the suggestion or allegation of judge Gibson in Fitler's case, that the word "settlement" imports a *joint* act of the parties, can we refuse the same interpretation to the word "*settled.*" If where the law directs a *settlement* of an account, it implies that both parties are to be present, and acting in making it: when the officer certifies that it is *settled*, the same implication arises not only from the force of the term, but from the presumption that it was settled according to law.

Again. The proofs of these accounts were in the hands of J. Nicholson, probably in November 1796; in which it is severally stated, that his account was "*settled*" in March 1796. If the term has the meaning now given to it, J. Nicholson had then an allegation by the accounting officers, that these settlements were by the said officers in conjunction with him, and he never denied the allegation or the inference; but by taking, as is asserted for him, these accounts as the basis of the judgment afterwards confessed by him, affirmed it.

On all these grounds I am of opinion, that this objection of the want of notice of the settlement of the accounts of J. Nicholson, cannot avail the plaintiffs in this cause, or affect the validity of the settlements.

The case of Smith v. Nicholson decides, and I think very properly, that where the register and comptroller agree in the settlement of an account, the account need not be transmitted to the governor for his confirmation or revisal—of course I make no further answer to this objection: but it is argued that if this be so, yet in all cases the balances must be reported to the governor, by whom the appeal is to be allowed and certified. This is true, and no such point was brought to the view of the court in the case just mentioned. The reason is obvious. The question then was, as it now is, as to the lien of the commonwealth, and which lien was given by the law of 1785, on and by the *settlement* of the account, and was full and complete when that settlement was full and complete, which it was on the agreement of the register and comptroller When the further confirmation of the governor was necessary to the *settlement*, then the lien did not attach until that confirmation was obtained: but no act of the governor being necessary to this settlement, it at once created the lien; subject, it is true, to such alteration in the amount secured by it as on appeal might be found due, but if no appeal was taken, it stood for the balance found by the register and comptroller on the settlement of the accounts. This answer also will meet the objections that these accounts were not entered in the books—although those produced are certified by both officers to be entered. The entry either of the whole account or the balance is no essential part of the settlement—on the contrary, the account must be settled and finally, unless appealed from, before it can be entered.

It has been strongly argued that the balances must be in money—not in stock, certificates or other effects. For this I can only look to the accounts themselves,

which profess to give money balances in dollars and cents. I believe no continental certificates, or certificates of stocks, were given for dollars and cents. If in this I am correct, it is clear that in stating the accounts and striking the balances, the stocks had been valued and reduced to money.

It is said that the order of settlement by the accounting officers has been reversed. There might be some embarrassment on this question if it were material; but as accounts have been produced, settled in both ways, and any one is sufficient to give a lien to be the foundation of the subsequent acts of assembly, we need not stop to examine this objection more particularly; we are not now settling the accounts, nor inquiring which of several has given a legal balance—but whether an account has been settled so as to give a lien to the commonwealth, under the provisions of the law of 1785.

Besides the objections to these settlements by the force of which it is maintained that they created no lien in favour of the commonwealth, it has been argued that if such lien were given by them, it was afterwards lost by the judgment entered for the same debt in March 1787, rendered in a suit brought against J. Nicholson, in the supreme court of the state, to September 1795.

This was antecedent to the settlements. The argument is that the commonwealth had two modes of proceeding, to secure and recover moneys or effects due to her. 1. The ordinary proceeding by a suit in one of her courts, regularly prosecuted to judgment. 2. By a settlement of the account of the debtors, and the lien thereby created for the balance found due. That she could not have or use both at the same time, and in this case having made her election to proceed by suit, she can claim nothing by the settlement It has been further strongly urged by the last counsel, in connexion with this point, that the two claims are here inconsistent, for that while the suit demands the certificate and stock as the *property* of the commonwealth—the accounts, by charging him with their value, consider them as the property of J. Nicholson. The declaration is produced to show this understanding of the case. This is very much a technical view of the proceeding. But this is not the only answer or explanation of it. When the suit was brought, and the declaration has reference to that period, the account had not been settled, and the certificate and stock was really the property of the commonwealth, in the hands of the defendant. More than a year afterwards the accounts are settled between the parties; and a value is given to the certificates and stock which had been claimed in the suit, and he is charged with them at their money value. Then they became the property of J. Nicholson, and he becomes indebted to the commonwealth for the value—the account is accordingly so settled—with all the legal effects of the settlement. At the next meeting of the court, in March 1797, when the cause is called for trial, a judgment is given and taken for the money value previously accorded to the certificates and stock: and the result of the whole operation is, that the commonwealth has a settlement, lien and judgment at the same time, against the same person for the same debt. If there is any thing illegal or unusual in this, it is unknown to me. Are not the instances without number, in which a party is allowed to have two or more securities, and two or more remedies for the same object or debt, which he may prosecute sometimes together and sometimes successively without impairing either? If the judgment did merge and destroy the lien—could it do so without becoming its substitute and as fully serving all the purposes of the defence? To avoid this conclusion, the plaintiffs have made an extraordinary effort. They argue at one time that no lien can be claimed by virtue of the settlements, because neither the commonwealth nor her accounting officer had any such expectation or intention: and the judgment of March 1797 is invoked to demonstrate the truth of this allegation. At another time they argue that the commonwealth can have no advantage in these sales from the lien of her judgments, because the legislature had no such expectation or intention, but looked altogether to the settlement liens. By this ingenious process of reasoning, the

commonwealth is made to destroy her own rights, by her own *intentions*; and it is not the least remarkable feature in the argument, that she has done this by the very acts by which we may say she supposed she was strengthening and securing those rights. In 1797 she abandoned the settlements to rely upon her judgment; and in 1807 she abandoned the judgment to resort to the settlements which she had surrendered and lost ten years before.

If the defendants are to be deprived of the liens of the law of 1795; they then go to the judgments obtained by the commonwealth against J. Nicholson, as sufficient to support the sales ordered by the acts of 1806 and 1807—and the titles derived from those sales. And why are they not? Why are these judgments not such liens as satisfy the provisions of those acts and afford a foundation for the proceedings thereby directed? The only pretence set up by the plaintiffs against them is that the legislature did not intend it; with a reference to a section in one of the acts which relates to a dispute with the Asylum Company to support the allegation. Can I say that the legislature did not intend to exercise all the rights which these judgments gave to the commonwealth? Can I say by a forced and remote inference that they intended so great a wrong to the interests they were bound to protect? I turn to the acts for this intention, and do not find it any where declared or expressed. I find no abandonment of any right the commonwealth had against J. Nicholson or his property, for the recovery of the debt he owed to her. The language of the acts is of sufficient comprehension to include the liens by judgments—indeed as fully and clearly as the liens by the settlements—and there is no more exception of the one than of the other. The various provisions of these acts relate to the lands of J. Nicholson, subject to the *lien* in one act and to the *liens* in the other of this commonwealth. I look in vain for any reason legal or logical to induce a belief that the legislature in their acts of 1806 and 1807, intended to relinquish the lien which the law gave them upon the lands of J. Nicholson, by virtue of the judgments against him.

If the law of 1785 is a good and valid act of legislation, and if either by virtue of settlements made of the accounts of John Nicholson, or by the judgments rendered against him at the suit of the commonwealth, there was in 1806 a legal and subsisting lien on all his real estate within the state; the only remaining question is, whether the acts of 1806 and 1807, or such parts of them as are necessary to the title of the defendants, are valid and constitutional laws, or whether they violate any of the provisions of the constitution of the United States, or of the constitution of Pennsylvania, and are so inconsistent with them or either of them, that it is the right and duty of the court to declare them to be null and void. The power and right of the court to do this has been freely admitted by the counsel on both sides; indeed I do not see how it is possible to doubt it. If we are bound faithfully to administer the law of the land; if it is our duty to give to every suitor the rights he is entitled to under that law; it follows that it is our right and duty to seek for that law in the declared will of the people, who alone have the power to make it: and if in this search we find conflicting acts, both professing to be the will of the people, we must yield submission to the greater or paramount law, and disregard the inferior.

That the constitution is that paramount law, and that acts of legislation are subordinate to it cannot be denied, and the consequence is that where they cannot be reconciled—where both cannot be executed, the courts, when called upon to declare the law, must give the effect to the constitution, and annul the act, which would violate and defeat it. This is, however, a high exercise of power, and should always be attempted under a deep sense of the responsibility assumed by the courts, with a profound respect for the legislative body, and anxious desire to give effect to both acts, if they can be reconciled. The incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or supposed consequences. It must be clear, decided and inevitable, such as presents a contradiction

at once to the mind, without straining either by forced meanings or to remote consequences. It is the constitution that must be violated, and not any man's opinions of right and wrong, or his principles of natural justice. These are uncertain standards of legislative power, and must be referred to the discretion of those to whom the people have given that power, and to whom they must answer for an abuse of it. Under the direction of these principles, I approach the constitutional objections that have been made to the acts of the legislature of Pennsylvania of 1806 and 1807, and shall give to them a distinct and separate consideration. They are charged with oppression, injustice, partiality, an injurious departure from the ordinary modes of proceeding, and a total disregard to the rights and interests of others in the pursuit of the rights and interests of the state. If all this were true, there may nevertheless be evils for which we are not authorised to administer a remedy; there may be injuries we cannot redress, and errors we cannot correct; our power over the subject is measured to us by the constitution, and we must take care that in our zeal to redress real or supposed wrongs, we do not commit a greater wrong. If we agree that the state of Pennsylvania has exercised her authority with a strong arm and selfish spirit—if she has been a hard creditor, still this will not bring us to the point where we may array the federal power against her acts and demand of her to surrender the advantages she has thus obtained. If the authority she has exercised be her right, we have no control over the manner in which she may choose to use it. It has been more than once urged upon you, that it is the liberal and humane policy of Pennsylvania to postpone the payment of debts due to herself, and to pay individuals first. There is such a provision in the law of 1794, directing the order for the payment of the debts of a decedent by executors or administrators—but does this furnish a rule for any other case? Has it ever done so? If by a general law (not the constitution) debts due to this commonwealth were in all cases to be paid last, would this take from the legislature the power either to repeal the law altogether; or to alter it in a special case for reasons thought by them to be sufficient, which would be a repeal pro tanto. Other states claim a priority in all cases, and can it be unconstitutional or unjust in the legislature of Pennsylvania to do so in a very peculiar case, taking upon themselves to judge of the reasons.

The acts in question are alleged to be illegal: 1. Because they authorize a sale of the lands of the debtor, without a previous *inquisition* to ascertain whether their rents and profits would not pay the incumbrances on them in seven years. We ask, what is the right of a debtor to this *inquisition?* How does he derive it? Assuredly not from the constitution, nor from those natural and eternal principles of justice which have been so often mentioned. It is the gift of legislative indulgence, a mere gratuitous benevolence to the debtor, in derogation of the rights of the creditor, who on strict principles of justice ought to have his money immediately—ought to be allowed to make his debtor's property available to pay his debt without delay, and not be compelled to take the possession and care of an estate he does not want, and wait for its slow and uncertain proceeds for the payment of a debt which by the contract of the debtor was to have been discharged long before. This right is by no means so sacred as has been supposed, nor is a resumption of it so unusual. The legislature has not hesitated to withdraw it when they thought the public interest required it. Lands are sold for taxes without an inquisition and by a very summary process, and this has never been deemed illegal or oppressive. Further, the courts of the commonwealth have taken upon themselves the authority to dispense with this proceeding in many cases in which they believed it would be useless—as in cases of levies on unseated lands, on vacant town lots, on uncertain estates in land. It would be strange to say after such precedents that the act of 1807 is unconstitutional and void, because it orders a sale of John Nicholson's land without an inquisition, or even to complain of it as unusual, oppressive and injurious, especially as, so far as we are informed of the

situation of these lands, the inquisition would not have been necessary for a sale under a judgment and execution. Who has been injured, who oppressed by this proceeding?—I mean the omission of the *inquisition*. Neither John Nicholson nor his creditors. On the contrary, a great and useless expense has been avoided, which would have consumed no inconsiderable portion of the proceeds of the sales in the case of John Nicholson and his creditors.

As connected with this part of the argument, I will now remark, that the sales by the commissioners instead of by the many sheriffs of the many counties in which the lands lie, had the same effect in saving expenses and charges which would exhaust the fund. It is replied that the state has saved perhaps *five* per cent, by giving *ten* to the commissioners. But it must be observed, this ten per cent was paid by the state out of her moneys, and constitutes no charge upon John Nicholson or his creditors.

2. The want of a public notice of those sales, has been urged against the legality of this act: and this is presumed because no proof of notice has been given? I cannot allow the inference. By the express enactment of the law the deed of the commissioners is declared to be prima facie evidence of the grantee's title, and of course of the regularity of their proceedings. If there was not a provision of the law, I should certainly, in the first instance, presume, at this late day, and under the circumstances of the case, that the proceeding had been regular, and the notice required by the act given. The legislature provided liberally for this notice; much more so than the debtor would have been entitled to, if his land had been sold under the executions. In that case the notice of the sale would have been "by so many writings upon parchment or good paper, as the debtor shall reasonably request to be put up in the most public places of the *county* at least *ten* days before the sale." By the act of 1807, it is ordered that "in all cases of sales made by the commissioners, at least *twenty* days notice shall be given of the time and place of sale, by advertisement in the newspaper printed in the county where the lands respectively lie, if any be there printed, and if not, in the newspaper printed nearest to such county, and also in two newspapers printed in the city of Philadelphia." The notice here directed is similar to, if not the same with, that directed of sales of unseated lands for taxes.

3. The power given to the commissioners to make compromise with persons who may allege title to any of the lands, has been vehemently complained of, and even declared to be unconstitutional. What is the ground of this complaint and charge? How is this an unconstitutional grant of power? Does the state assume any right that any individual would not possess in like circumstances? When about to sell a tract of land as the property of John Nicholson, to satisfy a debt due by him, a third party sets up a claim to the land. Instead of encountering the trouble, expense and delay of litigation to decide this question, the state offers a compromise, and authorizes the commissioners or agents to arrange the terms of the compromise, and to bind her finally and conclusively by their decision and agreement—"their proceedings shall be final and conclusive upon the commonwealth," not upon John Nicholson or his creditors, who have not the most remote interest in this proceeding. It is an arrrangement and contract in its terms, in its object, and in its effect, wholly between the commonwealth and the claimant of title to the land; it touches no right of John Nicholson or his creditors; it deprives them of nothing, and makes no change in their condition or relation to the land, to each other, or to the commonwealth. As respects the rights of John Nicholson and his creditors, every thing remains as before.

When a compromise is effected, what are the commissioners authorized to do? "To execute and deliver an assignment of *so much of the liens of the commonwealth* against the estate of John Nicholson, as may be equivalent to the consideration paid;" and the holders of the assignment "may at any time proceed upon the liens to sell the lands which were the subject of compromise." Was not this

an assignable right or interest; and when assigned, would not the assignee hold all the rights of the commonwealth in the subject assigned, and no more? Whatever objections of law or fact John Nicholson or his creditors could have opposed to this lien or any proceeding under it while it remained in the hands of the commonwealth, they could oppose with like effect to the assignee holding from the commonwealth.

The purchaser of the lien stands precisely in the place of the state, with no greater rights than she had, and no greater wrong to John Nicholson or his creditors. The only difference is, in case of a controversy they will have an individual instead of a commonwealth for their antagonist. Is this complained of as an injury? What provision or principle of the constitution is violated by it?

While the objections to these laws we have just considered were charged to be violations to the constitution, the charges were left on the general allegation and argument, but no attempt was made to designate the article or provision of the constitution which it was supposed was violated. On some other points the counsel for the plaintiffs have been more specific in their objections under this head, and have referred us to parts of the constitution of the United States and of Pennsylvania, which they allege to be infringed. They assert that these acts impair a contract, or the obligations of a contract. That they take away the trial by jury, and deprive a citizen of his property without the judgment of his peers. You are familiar with the parts of our constitution to which these allegations refer, and it is unnecessary for me to recite them. We proceed to inquire, what contract or obligation of a contract has been impaired by these laws or either of them? The plaintiffs have mentioned two—1. The original contract between J. Nicholson and the commonwealth for the sale and purchase of the land. 2. The contract or agreement made between them when the judgment was entered against him in the supreme court of Pennsylvania. 1. The contract for the purchase of land. The argument is that John Nicholson had, by his warrant, survey and the payment of money to the commonwealth, acquired an equitable or inchoate title to these lands, and that the commonwealth had bound herself to complete this title by delivery to John Nicholson of a legal deed of conveyance; but that, by selling these lands under the laws in question, she had put it out of her power to complete or perform this part of it; and thereby has virtually violated it. Let us consider whether, by these laws, the commonwealth repudiated any right she had given to John Nicholson by her contract with him, and whether she had disabled herself from doing any thing she was bound to do by that contract. What had she done? She had vested in him the property of these lands—he had legally acquired the property in them. Does she deny it, or resume it by these acts? By no means—on the contrary, all the proceedings directed by these laws are founded on the basis that the lands are the property of John Nicholson, and, *as such*, liable to the liens of the commonwealth. What says the first act on this point? The commissioners are ordered to procure copies of deeds and other writings relating to the *real estate* of John Nicholson, to ascertain the quality of the estate of John Nicholson, subject to the lien of the commonwealth. Through every section of this act the lands to be sold under it are invariably spoken of and described as the estate or property of John Nicholson. So of the act of March 1807. The governor is to issue process to the commissioners to sell such lands as they may specify, "as the property of the late John Nicholson." The purchaser is to receive a deed for the property sold to him "as and for such an estate as the said John Nicholson had and held the same at *the time of the commencement* of the liens of the commonwealth against the estate of the said John Nicholson." A scrupulous regard is here paid to the right of any citizen who may have acquired any right in these lands from John Nicholson, between the period of his purchase from the commonwealth, and the commencement of the lien, a space of more than two years. The original contract then, it is evident, was unaffected, nay, it was in terms affirmed by the laws of

1806 and 1807. Did these impair her further undertaking to give a deed or patent for the premises. In the first this undertaking was not absolute, but depended on contingencies or things to be further performed on the part of the purchaser. But let that pass. Can it be denied that the right of property which John Nicholson had in these lands was such as he might alienate and transfer to another? that it was such as might be taken and sold by process of law for his debts, and that his alienee or the purchaser at a sale for his debts would acquire all his interest, all his title, and all his right to any further assurance of title? This part of the contract of the commonwealth is neither violated, impaired or diminished by the passing of the land from J. Nicholson to any other person, but it follows and sticks to the soil, and becomes vested in any and every owner of the soil. The sale under the law of 1807 manifestly has no more effect upon the obligations of the commonwealth to complete the inchoate title sold to John Nicholson in 1794, than if the land had been assigned by John Nicholson, to a bona fide purchaser, or sold under a judgment and execution from one of the courts of the commonwealth.

We will now briefly inquire how these acts violate or impair the agreement made at the time when the judgment was entered, in March 1797. This agreement we have on the records of the supreme court of the state, and it is now fully before us. It is agreed on the part of J. Nicholson, that a judgment be entered against him for the sum of one hundred and ten thousand dollars and eighty-nine cents, rating the stock for which the suit was brought at certain specified prices. It is stipulated that "in the set-off, the stock be allowed at the same rate, the defendant to be allowed three months to point out any error to the satisfaction of the comptroller-general and register-general; such errors to be deducted from the sum for which the judgment shall be entered." Errors, if any, against the commonwealth, are also to be corrected. The agreement concludes—"the sum for which judgment is now entered to be altered by the subsequent calculation of the comptroller-general alone."

What are we to understand by this? That the commonwealth claims of John Nicholson on that suit the sum of one hundred and ten thousand dollars and eighty-nine cents—that John Nicholson having then nothing to show to diminish that sum, agreed that a judgment should be entered against him—a final judgment for that amount: but supposing that he might show himself entitled to some reduction or set-off, or might detect some error in the account, a right is reserved to him to do so, provided it was done within three months. If within that period he had shown an error or a further credit, he was entitled to do so. What effect would that have had on the judgment? It would neither have opened it, nor in any manner disturbed it, nor have entitled John Nicholson to any further trial before a jury. It would have lessened the amount to be paid in satisfaction of the judgment, and for which an execution might be issued, and nothing more; nor even this, unless the comptroller and register were satisfied of the justice of the deduction demanded. But J. Nicholson lived for several years after the date of this agreement, and never pointed out an error or claimed any deduction or set-off, as far as we are informed. Further, an execution issued on that judgment two years before J. Nicholson's death, and we know of no objection made to it by him, or any allegation or pretence that it was contrary to the agreement for entering the judgment.

It has been finally argued that these laws violate the contract made by the commonwealth when she sold them, that they should be subjected to the payment of the debts of the purchaser only in the usual mode by which other lands of any other citizen were subject. We ask where is this contract, or anye vidence of it? Again —how has it been shown that the lands of any other citizen being a debtor to the commonwealth, might not have been subjected to the same proceedings? The plaintiffs must sustain both these positions to give any force to the argument. In this case it is not only the lands of John Nicholson, bought of the commonwealth, that are subjected to the provisions of these laws, but all his real estate, however

he may have obtained it. The effect of this agreement would be to render the law void as to the real estate purchased of the commonwealth, and good and constitutional as to all the rest. The case of Stoddard v. Smith, 5 Bin. 355, sufficiently answers this objection. Certain lots in the city of Washington were sold, and bonds and notes taken for the purchase money. These not being paid, the commissioners resold the lots, agreeably to an act of the legislature of Maryland, passed subsequently to the contract of sale—and it was contended that this impaired the validity of the contract and was therefore unconstitutional. The supreme court of this state said, No—it does not impair the contract, but merely gives a *new remedy*. This act of Maryland gave a special procedure in a *particular case*, which has been so strongly urged as unconstitutional against the acts of Pennsylvania. If the process to sell the land, in 1798, was not a violation of the agreement, how is the process for the same purpose a violation in 1807, provided it is clear of other objections.

We proceed to the other objections, on constitutional grounds.

1. It is a judicial act. The position that a legislature cannot constitutionally perform a judicial act, is supported by no authority: nor has it any reason in public policy or convenience. On the other hand it is contradicted by legislative usage and the highest judicial decisions. It is true, as has been argued by the plaintiffs, the constitution of Pennsylvania divides the powers of government under three general heads of legislative, executive and judicial: that it ordains that "the legislative power of the commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives;" that "the supreme executive power shall be vested in a governor," and that "the judicial power shall be vested in a supreme court," &c.

This, however, is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department. There are things necessary to be done in the administration of the government, of a character so mixed and blended, partaking of the elements of all these divisions of power, that we could not know to which to assign it; it could not be exclusively claimed by either. If, however, the acts performed in this case by the legislature were clearly judicial, they are not therefore unconstitutional and void. So have the supreme court adjudged in several cases, at least in relation to the constitution of the United States. So have the courts of Pennsylvania repeatedly said, sitting under the constitution of Pennsylvania, and deciding upon acts of the legislature partaking largely of judicial functions. That this division of power is not to be taken so strictly as the plaintiffs contend for, is manifest from the unquestioned laws that have been produced upon this trial, treated and claimed by both parties as good and valid acts of legislation; in which you have seen judicial powers, strictly such, given to the executive in the settlement of the accounts of persons with the commonwealth. This is a question of debtor and creditor, of charges and vouchers between the commonwealth and a citizen, and the governor is constituted the tribunal to decide it, with all the powers of a judge and jury, in all cases where the register and comptroller shall differ. The whole judicial authority in such cases is vested in the governor; he decides the law and the fact; he receives or rejects evidence; he exercises, indeed, higher and greater judicial powers, than are given to any court, between citizen and citizen.

I have given this consideration to the question because it has been so seriously insisted upon by the counsel for the plaintiffs. But how does this objection stand in point of fact? What judicial power was exercised by the legislature in these acts? I can discover none. They did not decide the question of indebtedness of John Nicholson to this commonwealth, nor its amount. This was *finally and conclusively* done, not only as regards J. Nicholson, but the commonwealth also, by a settlement of an account more than ten years before. It was also done as conclusively by judgment confessed by John Nicholson in the supreme court of the state.

the supreme judicial power, ten years before. There was nothing left on this head to be decided by any authority. Does then the act decide the other question between the commonwealth and John Nicholson—that is, the alleged lien on all his real estate? Not at all. It neither creates the lien nor gives it any strength or legality that it had not before. The lien had been created by a law of the commonwealth passed more than twenty years before, and acted upon in relation to all public debtors from that period. In 1807, the legislature, taking the debt as it had been legally and finally ascertained by a settlement of the account of John Nicholson, or as it had been confessed and admitted in March 1797 by J. Nicholson himself, and taking this lien as it had been given by the law of 1785, proceed to collect their debt, and enforce their right by the provisions of the laws now questioned. They are truly and strictly as has been argued for the defendants, remedial acts to enforce a right, not to give it—to collect a debt not to adjudge it to be due.

These observations will also serve as an answer, or at least as expressing my opinion of the objection that has been so pressed upon these laws as being made in violation of the constitutional right to a trial by jury. Trial by jury should be as heretofore. This is true, but it must be in a case in which there is something for a jury to try. On a careful examination of these acts, I have been unable to see a single fact or enactment in which J. Nicholson or his heirs have the least interest or concern which could, by any of our forms of proceedings or principles in the administration of law, be submitted to a jury for any purpose or in any shape. Was it the province of a jury to decide upon the powers given to the commissioners—the process or proceedings directed in order to make the sale—the terms of sale—the manner of sale—the authority to make compromises—in short, if a trial by jury were this moment offered to the heirs of J. Nicholson in relation to any of the provisions or matters contained in these laws, I know not what they could point out as a subject upon which a jury could act within the ordinary and established limits of their jurisdiction or authority?

There is no novelty in this proceeding, as to the material matters of fixing the debt, and selling the lands of the debtor without the intervention of a court, or the use of the ordinary process of the law. The ordinary taxes apportioned upon every citizen by assessors and commissioners, may be collected by a summary sale of the goods and chattels of a delinquent, on a very short notice.

The taxes assessed on unseated lands, whose owners may reside at any distance, may be sold for such taxes without the aid of any court, or jury, or inquisition, under the authority of county commissioners, and by a course of proceedings very similar to that provided by the acts now in question, and very different from the ordinary modes of proceeding to recover debts.

These revenue laws have never been questioned, as infringing the right to a trial by jury, or violating any part of the constitution.

Some other provisions of the constitution of the United States and of Pennsylvania have been referred to, especially those which declare that no man shall be deprived of his property unless by the judgment of his peers, or the law of the land. The construction put upon the clause in the constitution is repudiated by the opinion of the court in Stoddard v. Smith, already referred to. It does not mean that his property may not be made to answer for debts in any other way than by the usual and established modes of proceeding to recover debts, and the general laws of the land on that subject. A direct act of legislation to take his property and give it to another or to the commonwealth, might be liable to the exception. But when a man holds property which is subject to his debts, is a law unconstitutional which directs a proceeding by which this property is made to produce the money or debt to the payment of which he was liable? Is this depriving him of his property against or without the law of the land?

The objection made to these laws arising from the sections in relation to the Asylum Company, appear to me to have no unconstitutional enactments even as

regards that Company, much less any of which the present plaintiffs can avail themselves.

I also pass over the lien claimed by the defendants in virtue of the general law of Pennsylvania, by which the debts of a decedent are charged upon his lands. If necessary hereafter the defendant will have the benefit of these laws.

Upon the whole, and the best consideration I have been able to give this long and interesting case, during a trial in which my attention has been so much absorbed by the arguments of the most able counsel, coming out in their utmost strength, with great labour and long preparation,

I am of opinion,

1. That the accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted that the balances or sums of money thereby found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson throughout the state of Pennsylvania.

2. That the judgments rendered by the supreme court of the state, in favour of the commonwealth against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

3. That the several acts of the general assembly of Pennsylvania passed on the 31st of March 1806, and on the 19th of March 1807, are not repugnant to, or in violation of the constitution of Pennsylvania, but they are good and valid laws, and a rightful exercise of the powers of the legislature of Pennsylvania.

The whole law of the case is therefore in favour of the defendants.

No. II.

Opinion of Chief Justice Cranch, in the case Ex parte Watkins. *See ante, page 585.*

The defendant having been arrested upon three writs of capias ad satisfaciendum, at the suit of the United States, returnable on the first day of the present term, was brought into court on that day, upon the motion of the attorney of the United States for this district, and by him prayed in commitment.

The defendant, at the same time, moved the court to quash the writs, and to discharge him from custody, under the following circumstances:

On the 14th of August 1829, the defendant having been convicted, on three indictments for misdemeanour, at common law, and having been in close custody for three preceding months, was sentenced by this court to three months' imprisonment from that day on each indictment, making nine months in the whole, and to pay certain fines, amounting altogether to three thousand and fifty dollars, being the exact amount of the money of the United States which the jury found he had fraudulently obtained, and for which he had not accounted. The court, however, did not order the defendant to stand committed until those fines and costs should be paid, it not being the general practice of the court to make such an order, unless at the request of the attorney for the United States; and also, knowing that it would be in the power of the United States to issue writs of execution for those fines, if they should deem it proper so to do.

On the 3d of September 1829, the United States sued out three writs of fieri facias upon these judgments, returnable to the then next term (December term). These writs were duly returned nulla bona; and on the 16th of February 1830, the United States sued out three writs of capias ad satisfaciendum on the same judgments, returnable to the then next May term (viz. Monday, the 3d of May 1830).

The term of imprisonment under the sentence expired on the 14th of May 1830.

These writs of capias ad satisfaciendum were not returned by the marshal at that

term, nor was he called upon to return them; and nothing further appears, upon the records of the court, respecting them, until the 10th of January 1833, when the court being in session, as of November term 1832, they were filed in the clerk's office by the late marshal, with the following indorsement thereon: "*Cepi*—delivered over to my successor in office."

On the 14th day of January 1833 (being the first day of the term), the defendant applied to the supreme court of the United States for a writ of habeas corpus, and a rule was served on the attorney-general of the United States, to show cause why it should not be granted; and upon that rule the whole merits of the application were fully argued. The writ was issued, and the defendant was discharged from the custody of the marshal. On retiring from the supreme court, however, he was again arrested upon three new writs of capias ad satisfaciendum, issued upon the same judgments; which writs are the same first before mentioned, and do not purport to be issued as alias writs, nor do they in any manner refer to, or notice the former writs of capias ad satisfaciendum. They are in all respects like the former writs, excepting that they include some additional costs, bear teste on 23d day of January 1833, and are returnable to the first day of the present term (viz. the fourth Monday of March. More than a year and a day had elapsed between the teste of the former writs of capias ad satisfaciendum and that of the present writs.

Upon these writs the defendant is now held by the marshal in close custody.

When the marshal, upon the return of a capias ad satisfaciendum, brings into court the body of the defendant, and the plaintiff prays him in commitment, the order to commit is made, of course, unless cause to the contrary be shown. The counsel for the defendant were, therefore, called upon to show cause.

The questions involved in this discussion have been fully and ably argued, and the court have attentively considered the authorities cited, and traced them to their sources, as far as the means they have had, and the intervals between the daily sessions of the court would permit.

The counsel for the defendant rested their motion to quash the writs of capias ad satisfaciendum and discharge the defendant, upon three grounds:

1st. That the defendant could not lawfully be arrested and held in custody upon these writs, after having been taken and discharged upon the former writs.

2dly. That these writs ought not to have been issued without previous scire facias, more than a year and a day having elapsed between the issuing of them and the next preceding writs.

3dly. That the fines were excessive, and amount to a sentence of perpetual imprisonment.

The first question is the most important, as it is one which affects the right of personal liberty, and is that which seems to have been mainly relied upon in the argument.

The general principle is, that no man shall be arrested again for the same cause. This principle has been so long and so well established, as to have become a maxim in law—*Nemo debet bis vexari pro eadem causa.*

This rule, according to the English practice, is extended to mesne process, as well as to execution. Thus, after holding the defendant to bail, the plaintiff shall not discontinue his action because he does not like the bail, and again hold the defendant to bail for the same cause. (Belchier v. Gansell, 4 Bur. 2502.) Thus in the case of Imlay v. Ellefsen, 3 East, 309, it was held, that one who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause, although the form of action be changed. The language of the judges in that case, is not inapplicable to the present. Lord Ellenborough said, "it is likely enough that if the defendant, being a foreigner, and not residing in this country, be discharged on filing common bail, the plaintiff will lose his debt; but that ought not to warp our judgment in apply-

ing the law to the facts disclosed to us. There are many cases in the books where the plaintiff has been suffered to hold the defendant to bail a second time for the same cause of action; as, where he has erroneously commenced his action, or mistaken his remedy, and has discontinued it in due time, without oppression or *laches*. But here the full time elapsed which the law allows for his detaining the defendant in custody upon the first arrest; and after his discharge he arrested him a second time, and requires the court to aid the former defect in his proceedings or proof, by continuing the defendant in custody for a further period for the same cause of action, which must be sustained by the same proof, and even something more than would have sufficed in the former action. It is harsh enough to deprive men of their liberty, as a security for debt, in the first instance; but after having continued the defendant in custody, until the plaintiff lost the benefit of it by his own default, I should require a very strong case to induce me to consent to a further imprisonment."

Gross, J. declared himself of the same opinion.

Lawrence, J. said, "however ill the defendant may have behaved, we are not to punish him by confining him in prison upon a second arrest, for the same cause as before."

Le Blanc, J. said, "the rule would be nugatory, that a party should not be holden to bail a second time for the same cause of action, if, after a first arrest, on which the defendant was detained in custody as long as the rules of law would admit, and from which he was discharged on account of the delay of the plaintiff in not declaring against him in time, the defendant should be again liable to suffer, by being holden to bail again in a second action, for the same cause."

So in the case of Blackburn v. Stupart, 2 East, 243, Mr Justice Gross said, "that it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not; and therefore, although the defendant's conduct has been very scandalous, yet the rule must be made absolute to set aside the execution, although the defendant had agreed to be taken again if he did not pay in a given time."

So in Wright v. Kerswell, Barnes, 376: "if the defendant be superseded after judgment, for want of being charged in execution within two terms after judgment obtained, his person cannot be afterwards taken in execution.

The same point is also decided in Line v. Low, 7 East, 330—in Blandford v. Foote, Cowp. 72—and Topping v. Ryan, 1 T. R. 227, 273.

So, in Da Costa v. Davis, 1 Bos. & Pul. 342, it was held that a condition of a bond to surrender the defendant in execution, after he has once been discharged, is void.

So also in Vigers v. Aldrich, 4 Bur. 2482, it was decided, that a discharge of the defendant out of custody on a capias ad satisfaciendum by consent of the plaintiff, upon a new agreement, not fulfilled, was a satisfaction of the judgment, so that it would not support an action of debt.

So in Jacques v. Withy, 1 T. R. 557, it was held, that the discharge of a debtor from a capias ad satisfaciendum with the consent of the plaintiff, on a new agreement, founded on a consideration which failed by reason of informality in the security given, was so far a discharge of the judgment, that it could not be set off in a cross suit brought by that debtor against his creditor. Whether the particular decision in that case would now be considered as law, is immaterial; the principle, so far as a discharge of the person of the debtor is concerned, has never been denied, and is in accordance with this whole class of cases.

Mr Justice Ashhurst said, "but at all events, the discharge from the execution, is certainly a discharge at law. I know of only one case where a debtor in execution who obtains his liberty, may afterwards be taken again for the same debt, and that is where he has escaped; but the reason of that is, that he is not legally

out of custody. But where a prisoner obtains his discharge, with the consent of the party who put him in execution, he cannot be retaken."

Mr Justice Buller, after observing that the security was good at the time it was taken, but that it afterwards became void, said, "that, however, arose from the neglect of the defendant himself, in not complying with the directions of the statute;" "and the debt, having been once extinguished, cannot be revived again. This is not a new question. The case of Vigers and Aldrich goes the whole length of this—for it shows that if the defendant has been once discharged out of execution, upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. So here, if the defendant has neglected to avail himself of the advantage of the security, it is his own fault, and he must take the consequences."

The same rule of law is also recognized in Basset v. Salter, 2 Mod. 136; Thompson v. Bristow, Barnes, 205; and Clark v. Clement and English, 6 T. R. 525, where it is also decided that a discharge of one joint defendant from execution is a discharge of the other; and Lord Kenyon, in delivering the opinion of the court, recognizes the authority of the case of Foster v. Jackson, Hobart, 52, in which it was decided before the statute of 21 Jac. c. 24, that if the debtor died in execution, the judgment could not be revived against his executors. So in Tanner v. Hague, 7 T. R. 420, where the defendant had been discharged from execution on his undertaking to pay the debt at a future day; on non-payment of which the plaintiff sued out a fieri facias against him. Upon a rule to show cause why the writ of fieri facias and proceedings under it should not be set aside, it was contended by Erskine for the plaintiff, that the release of the defendant was conditional, and that as the condition was not performed, the plaintiff had a right to sue out another writ of execution.

The counsel on the other side relied on the cases of Vigers v. Aldrich, Jacques v. Withy, and Clark v. Clement; and contended "that there is only one case in which the plaintiff can re-take a defendant, who has been once in execution, namely the case of an escape."

"The court said that the cases cited proceeded on this ground; that it was considered that the plaintiff received a satisfaction in law by having his debtor once in custody in execution; and on the authority of those cases they made the rule absolute."

So in Walker v. Alder, Styles, 117, Trin. 24 Car. B. R. (1671).

With the plaintiff's consent the defendant, who was in execution, came to the plaintiff out of the prison, thinking to make some agreement with him; but no agreement being made, the defendant was taken again upon the same execution. The defendant brought his audita querela "and adjudged by the court to be well brought, for the execution was discharged by the prisoner's going at large; and therefore he could not be again taken upon it."

So in Price v. Goodrich, Styles, 387, Mich. 1653, Banc. Sup. "it was said by Roll, chief justice, if there be a judgment against three, and one of them is taken in execution, and be afterwards set at large by the plaintiff's consent, if any of the other two be afterwards taken in execution upon the same judgment, he may have an audita querela."

So also in Sir William Fish's case—Godbolt, 372 (3 Car. anno 1627).

Mr Justice Doddridge said, "if the execution be lawful and upon lawful process, and the party be delivered out of execution, then he shall not be taken again in execution. But if he be taken upon an erroneous process, if he be delivered out, he may be taken again in execution; for the first execution is erroneous, and is no record, being reversed."

So in the Year Book, 8 Hen. 7, 9, 10,—(Br. Execution, pl. 92, anno 1491)—"error was brought in the rendition of judgment in a writ of debt, and in the procla-

mation of outlawry therein; and he found mainpernors, but he did not keep his day, and the plaintiff in the debt prayed a capias for execution.

"Mordant. He was in execution by the mainprize, and therefore he shall have no other execution.

"The court. He was not in execution, for the recognizance was only to the king. Quod nota," says the reporter of the Year Book, "and here it appears, once executed—executed for ever, un foits exec' e pro imperpetuo, for he shall not have execution again."

So in the book of assizes, (Liber assisarum) (which is a report of cases at the assizes in the time of Ed. III. and therefore previous to the year 1372) fol. 22, pl. 43, Br. Execution, pl. 79. "In trespass; note, that if a man have judgment against another for debt or damages, and take his body in execution, the plaintiff shall not have elegit, nor fieri facias. Quod nota, for the taking of the body, at his suit or prayer, is full execution. And see elsewhere, that if he die, or escape, the plaintiff shall not have other execution."

There are several of these old cases in which it is said that if the defendant escape, the plaintiff shall not have other execution, and such was the law held to be in those days. But it is now well settled that escape is an exception to the general rule.

So also in 33 H. 6, 47, (anno 1455) Br. Execution, pl. 8. "In debt it was conceded in argument, that if a man take the body in execution by capias ad satisfaciendum, and the party die in prison, he shall not have other execution; but if he escape the party shall have an action of account against the warden," (i. e. the warden of the Fleet-prison) per Prisot and per Davers.

The inference from this case is in accordance with the previous cases, and the law as it was then understood, viz. that no person shall be twice in execution for the same cause.

And in 13 H. 7, 1, (anno 1497)—Br. Execution, 151, it is said by Keble, J, "if the sheriff return cepi corpus upon a capias ad satisfaciendum, the plaintiff shall not have other execution."

And again in Shaw v. Cutteris, Cro. El. 850—M. 43, Eliz. B. R. (anno 1601) "it was moved whether the party in execution dying before satisfaction made, the plaintiff may now have a new execution of this judgment?" (against the administrator) "and all the court held that he could not; for although it were said that he had his body in execution, but as a pledge for his debt, and, the party dying, the debt is never the whit the more satisfied; and if the two be taken in execution, and one of them dies, the other shall remain in execution; for the debt is not satisfied by his death, as 33 H. 6, 48, is, and it was so cited to be adjudged 26 Eliz. in the common bench, betwixt Johns and Wilcocks; yet they held that in regard the plaintiff hath elected this execution, (which is the highest execution) and the defendant died therein, the law will adjudge it as a satisfaction, when there is but one taken. But where two be condemned, the taking of one in exetion, and his death, is no discharge for the other."

The same point came before the court of King's Bench again in a more formal manner, and was expressly adjudged in the case of Williams v. Cutteris, Cro. Jac. 136, 143, p. 4, Jac. (anno 1606). it was a scire facias against an executor to show cause why the plaintiff should not have execution of a judgment against his testator. The defendant pleaded that his testator died in execution upon a capias ad satisfaciendum, issued upon the same judgment. To this plea the plaintiff demurred; because that execution was not satisfaction; "and it was prayed inasmuch as he did not plead that satisfaction was given, therefore execution might be awarded. But Tanfield and Yelverton (the other judges being absent) held that the bar was good; for when the body of the party is taken in execution, although it be not in itself any satisfaction, yet, as to him, there cannot be any other execu-

tion. But if two had been condemned, although one of them dies in execution, that is not any discharge for the other, because the execution is against both; and it is not satisfaction until the condemnation is satisfied. Yet when execution is against one only, the judgment being against one only; when he dies, no other execution can be against his goods or his land, than was in his life time; wherefore they held the bar to be good. But because it was a new case, and had not formerly been adjudged, they would be advised," and they took time, till the next term, to consider. At Hilary term, the same year, (Cro. Jac. 143) the case was moved again, "and Popham, Williams and Tanfield held that the plea is good; for when execution is awarded against one person only, and by a capias ad satisfaciendum, his body is taken in execution, and is returned; it is an absolute and perfect execution against him, and no other execution can be had against him, his lands or goods; and although the law saith that it is no satisfaction in itself; yet it is so high that there cannot be any other execution; and when he dies the execution is determined as to him, and there cannot be any other execution of his goods or lands: and not like to the case where two are condemned, and the one is taken in execution and dies, yet execution may be against the other; because it is not any satisfaction, and process is not determined against the other; but where the one only is in execution and dies, the executor is discharged, and there cannot be any new execution. Yelverton doubted thereof, because it is clear that his body is but a pledge for his debt, and is not any satisfaction in itself; wherefore he said that it was not reasonable that the party plaintiff should be deprived of all his remedy by his death. But notwithstanding, it was adjudged for the defendant."

The same point was afterwards decided by the court of common pleas in the 12 Jac. (anno. 1614) in Jackson's case, Moore, 857. That was also a scire facias against executors to revive a judgment against their testator. The defendants pleaded in bar, that their testator died in execution upon the same judgment; upon which plea issue was joined and the jury found a special verdict, which the court adjudged for the defendant. The third question argued was, "whether the death of the defendant in execution, is a discharge of the execution"—or as it is stated by Chief Justice Hobart in his Reports, p. 56, "whether a man taken in execution for debt and dying in execution, the debt be absolutely discharged, by his death, as against him." "And all the justices argued the case, and they all agreed, except Winch, that this was a discharge. And they cited a judgment in point between Williams and Lambe, p. 44, Eliz. Ro. 88, contrary to Blumfield's case in Coke's 5th Reports, wherefore judgment was given against the plaintiff. Nota, Pash. 43, Eliz. in B. R. Rot. 88, in Williams and Cutheridge's case, it was adjudged a full execution by the death, &c." The opinion of Lord Hobart is given at full length in his Reports, p. 52 to 62, where, speaking of executions that have their effect in part, he says, (p. 59) "but if a capias be executed, that is in law sufficient for the whole debt, for corpus humanum non recipit estimationem, so that if you take it at all, you must take it for the whole debt." And again, "I hold that a capias ad satisfaciendum is against that party, as not only an execution, but a full satisfaction by force, and act, and judgment of law; so as against him he can have no other, nor against his heir, or executor, for these make but one person in law."

Such was the law previous to the 21st of James; notwithstanding the dictum of Lord Coke in Blumfield's case, that in an action in the common pleas, between Jones and Williams, it was resolved by the whole court that if the defendant in debt dies in execution, the plaintiff may have a new execution by elegit or fieri facias. For that was the case of two men condemned in debt, and one was taken and died in execution, and yet it was held that the taking of the other was lawful; and such also was Blumfield's case. Neither of them, nor any other of the cases cited by Lord Coke, supports his dictum as a general proposition, "that if the defendant in debt dies in execution, the plaintiff may have a new execution by elegit or fieri

facias." And in Sir Edward Coke's own case, (the great case of prerogative) Godbolt, 294, Chief Baron Tanfield said, "if a common person arrest the body in execution, he shall not resort to the lands, contrary to Blumfield's case, Co. 5th part." So also in Foster and Jackson's case, Hob. 60, Lord Chief Justice Hobart says, "it is a prerogative of the king to have execution of the body, lands, and goods, not communicated to the subject but in case of statute merchant, and staple, and recognizance of that nature, which is by the statute law; and therefore the case put in Blumfield's, that where the party was taken in execution upon a statute, and died, and yet execution was had against goods and lands after, is nothing in this case; for they were all due at the first, and therefore might be taken at once or severally."

So also in Cave v. Fleetwood, Littleton's Rep. 335, (5 Car. anno 1629), the plaintiff's counsel having cited Blumfield's case to prove that if the defendant die in execution the plaintiff may have elegit, and that it is satisfaction that the law regards, "Hutton, J. said, that Blumfield's case is not law, for if the party die in execution by capias, the plaintiff had his execution, and shall not have any execution again, and so was Jackson's case adjudged in this court, and the making of the statute of 21 James shows that so the law was held."

So universal was the rule held to be, that the plaintiff should not take the body of the defendant twice in execution for the same cause, that it was even doubted whether a member of parliament, discharged temporarily by writ of privilege, could be taken again for the same debt. Thus the preamble to the statute 1 Jac. 13, (anno 1604) recites, "forasmuch as heretofore doubt hath been made, if any person, being arrested in execution, and by privilege of either of the houses of parliament set at liberty, whether the party at whose suit execution was pursued, be for ever after debarred and disabled to sue forth a new writ of execution in that case: for avoiding of all further doubt and trouble which in like cases may hereafter ensue, be it enacted, &c. that the party at whose suit, &c. after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution in such manner and form as by the laws of this realm he or they might have done if no such former execution had been taken forth or served."

So also the preamble of the statute 21 Jac. c. 24, (anno 1623), says, "forasmuch as heretofore it hath been much doubted and questioned if any person being in prison, and charged in execution by reason of any judgment given against him, should happen to die in execution, whether the party at whose suit, or to whom such person stood charged in execution at the time of his death, be for ever after concluded and barred to have execution of the lands and goods of the person so dying; and forasmuch as daily experience doth manifest that divers persons of sufficiency of real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison than to make any satisfaction according to their abilities—to prevent which deceit, and for the avoiding of such doubts and questions hereafter: be it declared, explained, and enacted, &c. that the party at whose suit any person shall stand charged in execution, &c. may, after the death of the person so charged and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, of the deceased person, as if he had never been taken or charged in execution."

Thus stood the law in relation to execution by capias at the time the charter of Maryland was granted, on the 20th of June, 8 Car. (anno 1642). The emigrants under that charter brought that law with them, together with all such other rights of English subjects as they could enjoy in their new situation. These rights were expressly guarantied to them by their charter, and were at the revolution confirmed to their descendants by the constitution and bill of rights of the state of Maryland. When this part of the district of Columbia was separated from Mary-

land, that law and those rights were expressly continued in force here by the act of congress of the 27th of February 1801; and, as modified by the statutes of Maryland prior to that date, and by acts of congress since, now constitute the law of this part of the district. Maryland continued from time to time to adopt such of the statutes of England as were applicable to her situation, up to the time of the revolution; and kept pace with the judicial tribunals of England in their modification and extension of the rules of the common law. Hence the decisions of those tribunals have been considered as authority in the cases to which they are applicable.

The law of execution by capias, therefore, as it existed in England at the time of the revolution was the law of Maryland on the 27th of February 1801, unless altered by the statutes of that state. We are not aware of any such alteration as can affect the present case.

The general principle remains as it was at the time of the charter; to wit, that no person shall be twice taken in execution on the same judgment.

The case of escape is the only exception recognized by the common law, and the reason of that exception is stated by Ashhurst, J. in 1 T. R. 557, to be, that the defendant is not legally out of custody; and that exception was for a long time denied or doubted; and even as late as the 8th and 9th of William 3 (anno 1697), it was thought necessary to pass an act (8 and 9 W. 3, c. 27, sect. 7), authorizing the plaintiff to retake the prisoner by a new capias, or to sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken.

A discharge under the insolvent law is no exception to the rule; for the body of the debtor once discharged by an insolvent law, from execution, cannot be lawfully taken on a new capias. The case of privilege of parliament, which is provided for by the statute of 1 Jac. c. 13, does not apply to this country.

The case of West's executors v. Hyland, 3 Harris and Johnson, 200, as there reported, seems to have recognized a new exception to the general rule. The marginal note of that case is thus: "where a capias ad satisfaciendum is returned cepi, and the plaintiff does not proceed to enforce the writ, by having the defendant committed, defaulting the sheriff, or having it entered '*not called*,' it does not preclude the plaintiff from taking out a new capias ad satisfaciendum." We have been furnished with a transcript of the record of that case from the court of appeals; and, although every thing stated in the marginal note is true, yet the printed report of the case does not state the fact, that the defendant had escaped, and that therefore the court refused to quash the second capias ad satisfaciendum and discharge the defendant. By the transcript of the record it appears that upon the return of the first capias ad satisfaciendum (which was returned cepi), the sheriff of Somerset had not the defendant in court, having suffered him to go at large. That the sheriff left the court two days before the close of the session, and that on the day after the sheriff had left the court, the defendant for the first time came in, but there was then no sheriff there, to whom he could be committed; so that the defendant did not appear in court in custody of the sheriff, as stated in the report. This was clearly an escape; for, in the case of Koones v. Maddox, 2 Harris and Gill, 106, it was decided by the court of appeals of Maryland, that "an action of debt will lie against a sheriff, who, having arrested a defendant on a capias ad satisfaciendum, permitted him to go at large until the return day of the writ, although the sheriff then brought the defendant into court." The case of West and Hyland, therefore, instead of furnishing a new exception to the general rule, is a strong confirmation of it, and shows that the only exception at common law is the case of an escape. No man knew the law and practice of Maryland better than Luther Martin, who had been in full practice nearly half a century, and who was the counsel for the plaintiff in that case; and his affidavit, which was filed in the cause upon the motion of the defendant's counsel to set aside the second capias ad satisfaciendum, shows that in his opinion the return of cepi upon the first, without further proceeding, operated as a discharge of the defendant,

unless the plaintiff could show it to be a case of escape. His reply, therefore, to the motion of the defendant's counsel, was, as appears by the record, that the defendant "before the last capias ad satisfaciendum was issued against him, and after the first had been served upon him, *escaped from the custody of the said sheriff*." The fact of the escape having been proved by the affidavit of Mr Martin and Mr Polk, the court refused to set aside the writ, and to discharge the defendant, and the record then proceeds thus: "and the said Lambert Hyland, being called, appears, and it being demanded of him whether he be the same person taken in execution at the suit of the said Hannah West, executrix as aforesaid, confesses that he is, and that he hath not the money to satisfy to the said Hannah West, executrix as aforesaid, the debt, damages, costs and charges aforesaid; whereupon, on the prayer of the said Hannah West, executrix as aforesaid, by her attorneys aforesaid, the said Lambert Hyland is by the court now here committed to the custody of the sheriff of Somerset county aforesaid, in execution for the debt, damages, costs and charges aforesaid, at the suit of the said Hannah West, executrix as aforesaid, there to remain, until, &c. and the said sheriff, being here present, takes charge of the said Lambert Hyland accordingly," &c. The court of appeals sat at Easton, in Talbot county. The capias ad satisfaciendum was directed to and returned by the sheriff of Somerset county. This record is also proof of the practice in Maryland, to require the defendant who had been arrested on a capias ad satisfaciendum to be brought before the court upon the return day of the writ, and committed in execution as a justification of the sheriff for holding the defendant in custody after that day.

That the general rule, as modified by the statutes of 1st and 21st Jac. and 8 and 9 W. 3, with the single exception of escape, remains as it was at common law, appears in Tidd's Practice (Troubat's edition, Philadelphia, 1828), 196, 1033, 1068, and in Saund. Williams's ed. 35.

That it prevails also in other states than Maryland, appears in the case of Yates v. Van Rensselaer and Schemmerhorn, 5 Johnson, 364, where the court said, "though we may say in the language of Justice Grose (2 East, 244), that the attempt on the part of the defendant to get discharged of the debt is scandalous, *yet the rule of law is settled*." And in Freeman v. Ruston, 4 Dallas, 217, where the court observed, "the case appears so clear to us, that we do not wish another moment for consideration. The law is settled in England, that a capias ad satisfaciendum operates as a satisfaction of the debt; as an extinguishment of the *lien* of the judgment. We have no other rule prescribed to us in Pennsylvania; nor can we perceive that there would be any policy or justice in departing from it."

Such, therefore, being the general principle so long and so well established, it is incumbent upon the United States to show either that they are not bound by the general rule, or that they are within some exception to it.

In the first place, it is said that the rule only applies to civil cases; and that this is a criminal case, and therefore not within the rule.

The answer to this objection is, that the United States are only authorized to issue a capias ad satisfaciendum for a fine *by the law of Maryland*, which they have adopted for this part of the district, and which, in giving the writ, expressly requires that "such proceeding should be had thereon, as in cases where similar writs are issued on judgments obtained in *personal* suits." The United States must take it as it is given; and when they do take it, they must proceed *civiliter*, and not *criminaliter*. The nature of the proceeding is changed; and the state of Maryland, by giving this civil remedy, has in effect agreed that she will so far waive any prerogative attached to her criminal jurisdiction. The United States by adopting the same remedy, must do the same. This point, we think, is decided by the supreme court of the United States, in Ex parte Watkins at the last term, when they admit that the United States were bound by the Maryland practice in regard to execution by capias ad satisfaciendum in civil cases.

But if the United States are bound by the general rule, it is said that the general rule is confined to the case of a discharge with the consent of the plaintiff. This position is not supported by the authorities cited. Blumfield's case (5 Co. 86, b.) is the strongest; but the authority of that case is denied in several subsequent cases; and in some the dicta, which appear to give some countenance to the position assumed on the part of the United States, are expressly overruled; as has been before noticed.

There is no pretence that the defendant escaped. On the contrary he was discharged by the supreme court of the United States upon habeas corpus, because the marshal had not, according to the exigency of the writ, and the practice of Maryland in like cases, any authority to detain him beyond the return term of the writ, unless under a commitment by the court at the prayer of the plaintiff, and in that case the United States did not pray him into commitment. The United States might have had the full benefit of their judgment and execution, but did not avail themselves of it.

To this, however, it is objected, that it was either the neglect of the marshal, in not bringing in the defendant, or of the attorney of the United States in not calling on the marshal to bring him in; and that the United States are not bound by the neglect of their officers.

This objection, we think, is also answered by the judgment of the supreme court in the case Ex parte Watkins at the last term. For the objection was as valid then as it is now—and if the United States were not bound by the neglect of the marshal to bring in the defendant at the return of the first capias ad satisfaciendum; and of the attorney of the United States to pray him in commitment; then the case would have stood before the supreme court as a case in which the marshal had brought in the defendant at the return of the writ, and as if the attorney of the United States had prayed him in commitment; and then that court could not have discharged him on the ground they did; for the only ground upon which he was discharged by that court was, that the United States had neglected to have the defendant brought into court at the return day of the writ and prayed in commitment. The same answer may be made to the supposition that the omission to have the defendant committed was caused by the mistake of the officer of the United States as to the law or the practice of the court. The objection was as valid in the case before the supreme court as it is here. But if it were not so, the United States having, by taking the writ of capias ad satisfaciendum, under the law of Maryland, placed themselves, so far as the proceedings are to be carried on under that writ, upon the ground of an individual in a personal suit, they are equally liable to lose the benefit of the writ by the neglect of their officers to pursue it to its full effect.

It may be proper to notice some expressions in some of the cases cited on the part of the United States, which, from their generality, may be supposed to favour the construction given to the general rule by the counsel for the United States.

It may be observed of the cases in which it is said that the taking of the body is good execution, but is not satisfaction, that they are cases where there was judgment against two or more defendants, and one of them taken in execution. In those cases the taking of one was not satisfaction as to the others. Such was the case 29 H. 8, Br. Execution, pl. 132, and Blumfield's case, 5 Co. 86 (b.), and the anonymous case in Moore, 29, ca. 96, and Cowley v. Lydcot and Bulstrode, 97, and Whitacres v. Hawkins, Cro. Car. 75, and Rosser v. Welch and Kennis, Godbolt, 208; Shaw v. Cutteris, Cro. El. 850; Williams v. Cutteris, Cro. Jac. 136, 148; Price v. Goodrick, Styles, 387, and Clark v. Clement, 6 T. R. 525.

The language of Mr Justice Baldwin, in delivering the opinion of the supreme court of the United States in the case Tayloe v. Thompson, 5 Peters, 370, has been cited to show that in every case of the discharge of a defendant from execution upon a capias ad satisfaciendum, without actual payment of the debt, or the consent of the plaintiff, he may have a new capias ad satisfaciendum and arrest the defendant

again upon the same judgment. The only point decided in that case, in relation to the question in this, was, that the arrest and escape of Glover upon a capias ad satisfaciendum did not destroy the lien of the judgment upon Glover's lands; and that was the whole extent to which it was necessary, in that case, to lay down the law as to the effect of a commitment of the body in execution. The language of the opinion, however, is—"the greatest effect which the law gives to a commitment on a capias ad satisfaciendum, is a suspension of the other remedies on the judgment during its continuance: whenever it terminates without the consent of the creditor, the plaintiff is restored to them all as fully as if he had never made use of any." Whether the negligence of the creditor in not pursuing his remedy, whereby he lost the benefit of the arrest, would be considered as evidence of his consent to the termination of the commitment, might be doubtful, but it cannot be admitted that the court would have decided that if the plaintiff has once had the body of his debtor in execution, and by his own negligence loses the full benefit thereof, without any fault on the part of the defendant, he may have a new capias ad satisfaciendum, and again take the body in execution on the same judgment. Lord chief justice Hobart, in Foster v. Jackson, (Hob. 57) says "neither can the body be taken for a time, or for part, as a fieri facias, but it must be totally and finally during his life." And in page 59 he says that if a capias be executed; that is in law sufficient for the whole debt; for the value of the human body cannot be estimated. It is but just and fair in construing the language of a judicial opinion, to consider it in reference to the point of the case, and to consider the court as not intending to extend the doctrine advanced, beyond the limit necessary to support the decision. All beyond that must be considered as a dictum, and of no greater weight than that of the authorities by which it is supported.

The case of Codwise and Gelston, (10 Johnson, 517) has also been mentioned; but in that case the debtor was never charged in execution, and because he had not been so charged, Chancellor Kent decided that the surrender of him, by his bail, to the sheriff, after judgment, and his release from the custody of the sheriff, by the order of the plaintiff, without taking him in execution, did not discharge the lien of the judgment upon the lands of the defendant.

These dicta are wholly insufficient to unsettle the long established principle of the common law that a man shall not be twice taken in execution for the same cause.

Being of opinion that the United States, when proceeding under the adopted law of Maryland, are bound by that principle; and that, in the present case, they do not come within any known and established exception to that rule; it being also apparent that the defendant has been twice taken in execution upon the same judgments, and is now held in custody under the second execution, without any fault on his part that can deprive him of the benefit of the rule, we deem it our duty to order him to be discharged.

This opinion renders it unnecessary to express any upon the other two points made in the argument.

The motion of the attorney of the United States to commit the defendant upon these writs, is overruled; and the writs are ordered to be quashed, and the defendant to be discharged from the custody of the marshal.

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OF

PRINCIPAL MATTERS.

ACTION.

1. A suit on a recognizance of bail is an original proceeding. A scire facias upon a judgment, is to some purposes only a continuation of the former suit. But an action of debt on a judgment is an original suit. *Davis* v. *Packard*. 276.
2. An action of debt on a recognizance of bail may be brought in a different court from that in which the original proceedings were commenced. *Ibid.*
3. Action of covenant brought by the plaintiff in error to recover the amount of certain rents alleged to have been due and in arrear from the defendant since the death of his intestate under an indenture, by which a certain annual rent was reserved out of the property conveyed by the indenture, and which the grantee covenanted to pay; a clause of re-entry for non-payment of the rent being contained in the deed. By the court: it is firmly established, that on a covenant to pay rent, reserved by the deed granting real estate subject to the rent, the personal representatives of the covenantor are liable for the non-payment of the rent, after an assignment, although there may also be a good remedy against the assignee. The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law in England. *Scott* v. *Lunt's Administrator*. 596.
4. The assignee of a fee farm rent, being an estate of inheritance, is, upon the principles of the common law, entitled to sue therefor in his own name. It is an exception from the general rule, that choses in action cannot be transferred, and stands upon the ground of

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being, not a mere personal debt, but a perdurable inheritance. *Ibid.*

5. Action on a bond executed by William Carson, as paymaster, and signed by A. L. Duncan and John Carson as his sureties, conditioned that William Carson, paymaster for the United States, should perform the duties of that office within the district of Orleans. The breach alleged was that W. C. had received large sums of money in his official capacity, in his life time, which he had refused to pay into the treasury of the United States. The bond was drawn in the names of Abner L. Duncan, John Carson and Thomas Duncan as sureties for William Carson, but was not executed by Thomas Duncan. There were no witnesses to the bond, but it was acknowledged by all the parties to it before a notary public. The defendants, the heirs and representatives of A. L. Duncan, in answer to a petition to compel the payment of the bond, say that it was stipulated and understood, when the bond was executed, that one Thomas Duncan should sign it, which was never done, and the bond was never completed; and therefore A. L. Duncan was never bound by it: they also say, that, as the representatives of A. L. Duncan, they are not liable for the alleged defalcation of William Carson, because he acted as paymaster out of the limits of the district of Louisiana; and the deficiencies, if any, occurred without the limits of the said district. Before the jury were sworn the defendants offered a statement to the court for the purpose of obtaining a special verdict on the facts, according to the provisions of the act of the legislature of Louisiana of 1818. The court would not suffer the same to be given to the jury for a special finding, because it "was contrary to the practice of the court to compel a jury to find a special verdict." The judge charged the jury that the bond sued upon was not to be governed by the laws of Louisiana in force when the bond was signed at New Orleans, but that this and all similar bonds must be considered as having been executed at the seat of the government of the United States, and to be governed by the principles of the common law; that although the copy of the bond sued on, which was certified from the treasury department, exhibited a scrawl instead of a seal, yet they had a right to presume that the original bond had been executed according to law; and that in the absence of all proof as to the limits of the district of New Orleans, the jury was bound to presume that the defalcation occurred within the district; and if the paymaster acted beyond the limits of the district, it was incumbent on the defendants to prove the fact: held, that there was no error in these decisions of the district court of Louisiana. This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed; and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington; and to the treasury, did the paymaster and his

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sureties become bound to pay any moneys in his hands. These powers exercised by the federal government cannot be questioned. It has the power of prescribing under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government; and, in contemplation of law, at the place where its principal powers are exercised. *Duncan's Heirs* v. *The United States.* 435.

ADMIRALTY.

1. A libel was filed in the district court of the United States for the eastern district of Louisiana, against the steamboat Planter, by H. and V., citizens of New Orleans, for the recovery of a sum of money alleged to be due to them, as shipwrights, for work done and materials found in the repairs of the Planter. The libel asserts that, by the admiralty law and the laws of the state of Louisiana, they have a lien and privilege upon the boat, her tackle, &c. for the payment of the sums due for the repairs and materials, and prays admiralty process against the boat, &c. The answer of the owners of the Planter avers that they are citizens of Louisiana, residing in New Orleans; that the libellants are also citizens, and that the court have no jurisdiction of the cause. Held, that this was a case of admiralty jurisdiction. *Peyroux et al.* v. *Howard et al.* 324.
2. By the civil code of Louisiana, workmen employed in the construction or repairs of ships or boats enjoy the privilege of a lien on such ships or boats, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their rights. The state law, therefore, gives a lien in this case. *Ibid.*
3. In the case of the General Smith, 4 Wheat. 438, S. C. 4 Peters's Condensed Reports, it is decided that the jurisdiction of the admiralty in cases where the repairs are upon a domestic vessel, depends upon the local law of the state. Where the repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on ships as security; and the party may maintain a suit in the admiralty to enforce his right. But, as to repairs or necessaries in the port or state to which the ships belong, the case is governed altogether by the local law of the state; as no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty. *Ibid.*
4. The services in this case were performed in the port of New Orleans, and whether this was within the jurisdiction of the admiralty or not, depends on the fact whether the tide in the Mississippi ebbs and flows as high up the river as the port of New Orleans. The court considered themselves authorized judicially to notice the

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situation of New Orleans, for the purpose of determining whether the tide ebbs and flows as high up the river as that place; and being satisfied that although the current of the Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water; New Orleans may be properly said to be within the ebb and flow of the tide, and the jurisdiction of the admiralty prevails there. *Ibid.*

5. In order to the decision whether the admiralty jurisdiction attaches to such services as those performed by the libellants, the material consideration is, whether the service was essentially a maritime service, and to be performed substantially on the sea or tide water. It is no objection to the jurisdiction of the admiralty in the case, that the steamboat Planter was to be employed in navigating waters beyond the ebb and flow of the tide. In the case of the steamboat Jefferson, it was said by this court that there is no doubt the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. *Ibid.*

6. Some of the older authorities seem to give countenance to the doctrine that an express contract operates as a waiver of the lien: but it is settled at the present day, that an express contract for a stipulated sum is not of itself a waiver of a lien; but that, to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. *Ibid.*

7. Jurisdiction.

ALIENS.

An alien does not lose his right to sue in the courts of the United States by a residence in a state of the union. *Breedlove et al.* v. *Nicolet et al.* 413.

APPEAL.

1. R. being indebted to the Farmers Bank of Alexandria, on certain promissory notes exceeding in amount one thousand dollars, conveyed to H. a lot of ground in Alexandria, exceeding one thousand dollars in value, devised to her by her husband, to secure the payment of the said notes by sale of the lot. R. claimed an estate in fee in the property conveyed to the trustee. The sum due to the bank was reduced by payments to less than one thousand dollars, and R. being deceased, a bill was filed by the bank to compel the trustee to sell the property conveyed to him by R. for the payment of the balance of the debt. The circuit court decreed that R. held no other interest in the property than a life estate, and dismissed the bill. The complainants appealed. On a motion to dismiss the appeal for want of jurisdiction, the debt remaining due to the bank being less than one thousand dollars, the amount re-

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quired to give jurisdiction in appeals and writs of error from the circuit court of the district of Columbia; it was held that the real matter in controversy was the debt claimed in the bill; and though the title of the lot might be inquired into incidentally, it does not constitute the object of the suit. The appeal was dismissed. *Farmers Bank of Alexandria* v. *Hooff et al.* 168.

2. No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying a record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but, in such a case, it must appear from the record that the evidence was used or offered to the circuit court. *Holmes et al.* v. *Trout et al.* 171.

3. A decree was pronounced by the district court of the United States for the district of Alexandria, in December 1829, from which the defendants appealed, but did not bring up the record. At January term 1832, the appellees, in pursuance of the rule of court, brought up the record and filed it; and on motion of their counsel, the appeal was dismissed. On the 9th of March 1832, a citation was signed by the chief justice of the court for the district of Columbia, citing the plaintiffs in the original action to appear before the supreme court, *then in session*, and show cause why the decree of the circuit court should not be corrected. A copy of the record was returned with the citation, "executed," and filed with the clerk. By the court. The record is brought up irregularly, and the cause must be dismissed. *Yeaton et al.* v. *Lenox et al.* 220

4. The act of March 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that an appeal may be prayed in court when the decree is pronounced. But if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error. *Ibid.*

5. The judicial act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record; the adverse party to have at least twenty days notice. This notice, the court understands, is twenty days before the return day of the writ. *Ibid.*

6. Matter assigned in the appellate court as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law. The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court. *Davis* v. *Packard et al.* 276.

7. Appeal dismissed because all the parties to the decree in the circuit court had not joined in the appeal to this court. *Owings* v. *Kincannon.* 399.

APPEAL.

8. The claimants of eighty-four boxes of sugar, seized in the port of New Orleans, for an alleged breach of the revenue laws, and condemned as forfeited to the United States for having been entered as brown instead of white sugar, claimed an appeal from the district court of the United States to the supreme court. The sugars, while under seizure, were appraised at two thousand six hundred and two dollars and fifty-one cents, and after condemnation they were sold for two thousand three hundred and thirty-eight dollars and forty-eight cents; leaving, after deducting the expenses and costs of sale, the sum of two thousand one hundred and fifty dollars and six cents. The duties on the sugars, considering them as white or brown, being deducted from the amount, reduced the net proceeds below two thousand dollars, the amount upon which an appeal could be taken. Held, that the value in controversy was the value of the property at the time of the seizure, exclusive of the duties, and that the claimant had a right to appeal to this court. *The United States* v. *Eighty-four Boxes of Sugar*. 453.
9. A mandamus was issued by the superior court of appeals of the eastern middle district of Florida, directed to the register and receiver of the western land district of Florida, commanding them to permit the entry and purchase of certain lands. From this proceeding, the register and receiver appealed to this court. The appeal was dismissed; the proceeding at mandamus being at common law, and therefore the removal to this court should have been by writ of error. *Ward et al.* v. *Gregory*. 633.

ARKANSAS TERRITORY.

Construction of statutes of the United States.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. It is not necessary to the validity of a deed of assignment for the benefit of creditors, that creditors should be consulted; though the propriety of pursuing such a course will generally suggest it, when they can be conveniently assembled. But be this as it may, it cannot be necessary that the fact should appear on the face of the deed. *Brashear* v. *West*. 608.
2. That a general assignment of all a man's property is *per se* fraudulent, has never been alleged in this country. The right to make it results from the absolute ownership which every man claims over that which is his own. *Ibid.*
3. An assignment was made by Francis West, to certain trustees of all his property giving a preference to particular creditors; who were to be paid their claims in full, before any portion of the property assigned was to be divided among his other creditors. By the court: the preference given in this deed to favoured creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

which the law has not yet restrained. It cannot be treated as a fraud. *Ibid.*

4. The assignment excluded from the benefit of its provisions, all creditors who should not within ninety days, execute a release of all claims and demands on the assignor of any nature or kind whatsoever. By the court. This stipulation cannot operate to the exemption of any portion of a debtor's property, from the payment of his debts. If a surplus should remain after their extinguishment, that would be rightfully his. Should the fund not be adequate, no part of it is relinquished. The creditor releases his claim only to the future labours of his debtor. If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms, by giving the release. It is not therefore voluntary. Humanity and policy both plead so strongly in favour of leaving the product of his future labours to the debtor, who has surrendered all his property, that in every commercial country known to the court, except our own, the principle is established by law. This certainly furnishes a very imposing argument against its being denied. The objection is certainly powerful, that it tends to delay creditors. If there be a surplus, the surplus is placed in some degree out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. But the property is not entirely locked up. A court of equity, exercising chancery jurisdiction, will compel the execution of the trust, and decree what may remain to those creditors who have not acceded to the deed. Yet the court are far from being satisfied, that upon general principle, such a deed ought to be sustained. *Ibid.*

5. Whatever may be the intrinsic weight of objections to such assignments, they seem not to have prevailed in Pennsylvania. The construction which the courts of that state have put on the Pennsylvania statute of frauds, must be received in the courts of the United States. *Ibid.*

6. The assignment transferred to the assignees a debt due to the assignor by the complainant. The complainant filed a bill against the assignees, claiming to set off against the debt assigned to them, the amount of a judgment obtained by him against the assignor, after the assignment. By the court: if subsequent to the assignment being made, and before notice of it, any counter claims be acquired by a debtor to the assignor, these claims may, unquestionably, be sustained. But if they be acquire after notice, equity will not sustain them. If it were even true, that they might have been offered in evidence in a suit at law brought in the name of the assignor, he who neglected to avail himself of that advantage, cannot, after judgment, avail himself of such discount as plaintiff in equity. *Ibid.*

BILL OF EXCEPTIONS.

The whole charge of the circuit court was brought up with the record. By the court. This is a practice which this court have uniformly discountenanced, and which the court trusts a rule made at last term will effectually suppress. *Magniac* v. *Thompson*. 348.

CASES CITED AND AFFIRMED.

1. The cases of Russell v. Clarke's Executors, 7 Cranch's Rep. 69, 2 Peters's Condensed Reports, 417; and Drummond v. Prestman, 12 Wheat. Rep. 515, cited. *Douglass* v. *Reynolds*. 113.
2. In the case of Polk's Lessee v. Wendell, 5 Wheat. 308, it is said by this court, that, on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under a void grant, can acquire nothing. *Sampeyreac* v. *The United States*. 222.
3. The cases of Nollan et al. v. Torrance, 9 Wheat. Rep. 537; Connolly et al. v. Taylor, 2 Peters, 556; and Cameron v. M'Roberts, 3 Wheat. Rep. 591, cited and affirmed. *Vattier* v. *Hinde*. 252.
4. The case of Carver v. Jackson, 4 Peters, 80, 81, cited. *Magnia* v. *Thompson*. 348.
5. The court are entirely satisfied with their former decision in the case of the Union Bank of Georgetown v. Magruder, 3 Peters's Rep. 87. *The Union Bank of Georgetown* v. *Magruder*. 287.

CHANCERY AND CHANCERY PRACTICE.

1. Practice.
2. Evidence.
3. A bill was filed in the circuit court of Ohio, claiming a conveyance of certain real estate in Cincinnati from the defendants, and after a decree in favour of the complainants, and an appeal to the supreme court, the decree of the circuit court was reversed, because a certain Abraham Garrison, through whom one of the defendants claimed to have derived title, had not been made a party to the proceedings, and who was, at the time of the institution of the same, a citizen of the state of Illinois, although the fact of such citizenship did not then appear on the record. Afterwards, a supplemental bill was filed in the circuit court, and Abraham Garrison appeared and answered, and disclaimed all interest in the case: whereupon the circuit court, with the consent of the complainants, dismissed the bill as to him. By the court. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of others, its jurisdiction may be exercised as to them. If, when the cause came on for hearing, Abraham Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him, if such decree could have been pronounced as to them without af-

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fecting his interests. No principle of law is perceived which opposes this course. The incapacity of the court to exercise jurisdiction over Abraham Garrison, could not affect their jurisdiction over other defendants, whose interests were not connected with his, and from whom he was separated, by dismissing the bill as to him. *Vattier* v. *Hinde*. 252.

4. The rules of law respecting a purchaser without notice, are formed for the protection of him who purchases a legal estate, and pays the purchase money without a knowledge of the outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully, only to the purchaser of the legal estate. Ever the purchaser of an equity is bound to take notice of any prior equity. *Ibid.*

5. The bill set forth a title in B. H., the wife of T. H., by direct descent from her brother to herself, and insisted on this title to certain real estate. The answer of the defendants resisted the claim, because the land had been conveyed by the complainants before the institution of the suit to A. C. The complainant in his replication admitted the execution of the deed to A. C., but averred that it was made in trust to reconvey the lot to T. H., to be held by him for the use and benefit of B. H., his wife, and her heirs, and to enable T. H. to manage and litigate the said rights; and that A. H., in execution of the trust, made a deed to T. H. The deed was recorded, and was exhibited, but it did not state the trust. The rules of the court of chancery will not permit this departure in the replication from the statements of the bill. *Ibid.*

6. Where the new parties to a proceeding in chancery are the legal representatives of an original party, and the proceedings have been revived in their names, by the order of the court on a bill of revivor; the settled practice is to use all the testimony which might have been used if no abatement had occurred. The representatives take the place of those which they represent, and the suit proceeds in a new form, unaffected by the change of name. *Ibid.*

7. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them. The party complaining, must show that he has more equity than the party in whose favour the law has decided. *Brashear* v. *West*. 608.

8. A complex and intricate account is an unfit subject for examination in a court, and ought always to be referred to a commissioner, to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions, and thus bring any question they may think proper before the court. *Dubourg de St Colombe's Heirs* v. *The United States*. 625.

CONSTITUTIONAL LAW.

1. The provision in the fifth amendment to the constitution of the United States, declaring that private property shall not be taken

CONSTITUTIONAL LAW.

for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States; and is not applicable to the legislation of the states. *Barron* v. *The Mayor and City Council of Baltimore.* 243.

2. The constitution was ordained and established by the people of the United States for themselves; for their own government; and not for the government of individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes. *Ibid.*

3. The record of the proceedings in this case, brought up with the writ of error to the court for the correction of errors of the state of New York, showed that the suit was commenced in the supreme court of the state of New York, and that the plaintiff in error, who was consul-general of the king of Saxony, did not plead or set up his exemption from such suit in the supreme court; but, on the cause being carried up to the court for the correction of errors, this matter was assigned for error in fact; notwithstanding which, the court of errors gave judgment against the plaintiff in error. The court of errors of New York having decided that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment of the court of errors was reversed. *Davis* v. *Packard.* 276.

4. As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789 gives to the district courts of the United States, *exclusively of the courts of the several states,* jurisdiction of all suits against consuls and vice-consuls, except for certain offences enumerated in the act. *Ibid.*

5. If a consul, being sued in a state court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by writ of error, claims the privilege, such an omission is not a waiver of the privilege. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered; it is the privilege of the country or government which the consul represents. This is the light in which foreign minis-

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ters are considered by the law of nations; and our constitution and law seem to put consuls on the same footing in this respect. *Ibid.*

6. If this privilege or exemption was merely personal, it can hardly be supposed that it would have been thought sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy, doubtless, led to the provision. It was deemed fit and proper, that the courts of the government, with which rested the regulation of foreign intercourse, should have cognizance of suits against the representatives of such foreign governments. *Ibid.*

7. The action in the supreme court of New York against the defendant, was on a recognizance of bail, and it was contended that this was not an original proceeding, but the continuance of a suit rightfully brought against one who was answerable to the jurisdiction of the court in which it was instituted, and in which the plaintiff in error became special bail for the defendant; and therefore the act of congress did not apply to the case. Held, that the act of congress being general in its terms, extending to all suits against consuls, it applied to this suit. *Ibid.*

8. It has been repeatedly ruled in this court, that the court can look only to the record to ascertain what was decided in the court below. *Ibid.*

9. Matter assigned in the appellate court as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law. The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court. *Ibid.*

10. The titles to lands under the acts of the legislature of the state of Pennsylvania, providing for the sale of the landed estate of John Nicholson, in satisfaction of the liens the state held on those lands, and the proceedings under the same are valid. *Lessee of Livingston* v. *Moore.* 469.

11. These acts, and the proceedings under them, do not contravene the provisions of the constitution of the United States, in any manner whatsoever. *Ibid.*

12. The words used in the constitution of Pennsylvania in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of John Nicholson. *Ibid.*

13. Juan Madrazzo, a subject of the king of Spain, filed a libel praying *admiralty* process against the state of Georgia, alleging that the state was in possession of a certain sum of money, the proceeds of the sale of certain slaves which had been seized as illegally brought into the state of Georgia; and which seizure had been subsequently, under admiralty proceedings, adjudged to have been illegal, and the right of Madrazzo to the slaves, and the money arising from the sale thereof, established by the decision of the circuit court of

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the United States for the district of Georgia. The counsel for the petitioner claimed that the supreme court had jurisdiction of the case, alleging that the eleventh amendment of the constitution of the United States, which declares that the judicial power of the United States shall not extend to any suits in *law* or *equity*, did not take away the jurisdiction of the courts of the United States, in suits in *the admiralty* against a state. Held, that this is not a case where property is in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person. It is a mere personal suit against a state to recover proceeds in its possession, and such a suit cannot be commenced in this court against a state. *Ex parte Juan Madrazzo.* 627.

CONSTRUCTION OF STATUTES OF THE UNITED STATES.

1. Forgery.
2. Robbing the mail.
3. Construction of the act of congress passed the 5th of May 1830, entitled "an act for the further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th May 1824, and for other purposes." *Sampeyreac* v. *The United States.* 222.
4. Under the pro isions of an act of congress passed on the 26th May 1824, proce dings were instituted in the superior court of the territory of Arkansas, by which a confirmation was claimed of a grant of land alleged to have been made to the petitioner, Sampeyreac, by the Spanish government, prior to the cession of Louisiana to the United States by the treaty of April 3d, 1803. This claim was opposed by the district attorney of the United States; and the court, after hearing evidence, decreed that the petitioner recover the land from the United States. Afterwards, the district attorney of the United States, proceeding on the authority of the act of 8th May 1830, filed a bill of review founded on the allegation that the original decree was obtained by fraud and surprise, that the documents produced in support of the claim of Sampeyreac were forged, and that the witnesses who had been examined to sustain the same were perjured. At a subsequent term Stewart was allowed to become a defendant to the bill of review, and filed an answer, in which the fraud and forgery are denied, and in which he asserts that if the same were committed, he is ignorant thereof, and asserts that he is a bona fide purchaser of the land for a valuable consideration, from one John J. Bowie, who conveyed to him the claim of Sampeyreac by deed, dated about the 22d October 1828. On a final hearing, the court being satisfied of the forgery, perjury and fraud, reversed the original decree. Held, that these proceedings were legal, and were authorized by the act of the 5th of May 1830. *Ibid.*
5. Almost every law providing a new remedy, affects and operates

CONSTRUCTION OF STATUTES OF THE UNITED STATES.

upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers; it only organizes a tribunal with the powers to entertain judicial proceedings. The act, in terms, applies to bills filed, or to be filed. Such retrospective effect is no unusual course in laws providing new remedies. *Ibid.*

6. The act of 1830 does not require that all the technical rules in th ordinary course of chancery proceedings on a bill of review shal be pursued in proceedings instituted under the law. *Ibid.*
7. Construction of the acts of congress relative to drawback on refined sugar. *Barlow* v. *The United States.* 404.
8. The legislature did not in the enactments in reference to drawback intend to supersede the common principle of the criminal as well as the civil jurisprudence of the country, that ignorance of the law will not exempt its violation. *Ibid.*
9. The act of the 27th of March 1804, by which the president of the United States was authorized to attach to the navy yard at Washington a captain of the navy for the performance of certain duties, was correctly construed by the head of the navy department until 1829, allowing to the defendant commissions on the sums paid by him, as the special agent of the navy department in making the disbursements. *United States* v. *Macdaniel.* 1.
10. A seizure of sugars was made under an allegation that they were of a different quality from that mentioned in the entry. By the court. The statute under which these sugars were seized and condemned, is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If either through accident or mistake the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred. *United States* v. *Eighty-four Boxes of Sugar.* 453.
11. Heads of the public departments of the government.
12. Public accounts.
13. Set-off.

CONSTRUCTION OF STATE LAWS.

1. Construction of the insolvent laws of Louisiana. *Breedlove et al.* v. *Nicolet et al.* 413.
2. The titles to lands under the acts of the legislature of the state of Pennsylvania, providing for the sale of the landed estate of John Nicholson, in satisfaction of the liens the state held on those lands, and the proceedings under the same, are valid. *Lessee of Livingston* v. *Moore.* 469.
3. These acts, and the proceedings under them, do not contravene the provisions of the constitution of the United States, in any manner whatsoever. *Ibid.*
4. The words used in the constitution of Pennsylvania in declaring the extent of the powers of its legislature, are sufficiently comprehen-

CONSTRUCTION OF STATE LAWS.

sive to embrace the powers exercised over the estate of John Nicholson. *Ibid.*

5. The common law of England, and all the statutes of parliament made in aid of the common law, prior to the fourth year of the reign of king James the first, which are of a general nature, and not local to the kingdom, were expressly adopted by the Virginia statute of 1776; and the subsequent revisions of its code have confirmed the general doctrine on this particular subject. *Scott* v. *Lunt's Administrator.* 596.

CONSULS.

1. The record of the proceedings in this case, brought up with the writ of error to the court for the correction of errors of the state of New York, showed that the suit was commenced in the supreme court of the state of New York, and that the plaintiff in error, who was consul-general of the king of Saxony, did not plead or set up his exemption from such suit in the supreme court; but, on the cause being carried up to the court for the correction of errors, this matter was assigned for error in fact; notwithstanding which, the court of errors gave judgment against the plaintiff in error. The court of errors of New York having decided that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment of the court of errors was reversed. *Davis* v. *Packard.* 276.
2. As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789 gives to the district courts of the United States, *exclusively of the courts of the several states,* jurisdiction of all suits against consuls and vice-consuls, except for certain offences enumerated in the act. *Ibid.*
3. If a consul, being sued in a state court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by writ of error, claims the privilege, such an omission is not a waiver of the privilege. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered; it is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations; and our constitution and law seem to put consuls on the same footing in this respect. *Ibid.*
4. If this privilege or exemption was merely personal, it can hardly be supposed that it would have been thought sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy, doubtless, led to the provision. It was deemed fit and proper, that the courts of the government, with which rested the regulation of foreign

CONSULS.

intercourse, should have cognizance of suits against the representatives of such foreign governments. *Ibid.*

5. The action in the supreme court of New York against the defendant, was on a recognizance of bail, and it was contended that this was not an original proceeding, but the continuance of a suit rightfully brought against one who was answerable to the jurisdiction of the court in which it was instituted, and in which the plaintiff in error became special bail for the defendant; and therefore the act of congress did not apply to the case. Held, that the act of congress being general in its terms, extending to all suits against consuls, it applied to this suit. *Ibid.*

COURTS OF THE UNITED STATES.

The question before the court was, whether the charge to the jury in the circuit court contains any erroneous statement of the law. By the court. In examining it for the purpose of ascertaining its correctness, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. The whole is to be construed as it must have been understood, both by the court and the jury at the time it was delivered. *Magniac* v. *Thompson.* 348.

CRIMES.

1. Forgery.
2. Robbing the mail of the United States.

DECISIONS OF STATE COURTS.

The rule of law being once established by the highest tribunal of a state, courts which propose to administer the law as they find it, are ordinarily bound, in limine, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, pro or con, upon the point under consideration, had been examined and disposed of judicially. *Lessee of Livingston* v. *Moore.* 469.

DEPOSITIONS.

Morris v. The Lessee of Harmer's Heirs. 554.

DUTIES.

1. Construction of the acts of congress relative to drawback on refined sugar. *Barlow* v. *The United States.* 404.
2. The legislature did not in the enactments in reference to drawback intend to supersede the common principle of the criminal as well as the civil jurisprudence of the country, that ignorance of the law will not exempt its violation. *Ibid.*
3. Sugars were seized on an allegation that they were of a different

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quality from that stated in the entry. By the court. The statute under which these sugars were seized and condemned, is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If either through accident or mistake the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred. *United States* v. *Eighty-four Boxes of Sugar.* 453.

EJECTMENT.

Lands and land titles.

ERROR.

1. The court refused to quash a writ of error on the ground that the record was not filed with the clerk of the court until the month of June 1832, the writ having been returnable to January term 1832. The defendant in error might have availed himself of the benefit of the twenty-ninth rule of the court, which gave him the right to docket and dismiss the cause. *Pickett's Heirs* v. *Legerwood et al.* 144.
2. The appropriate use of a writ of error, coram vobis, is to enable a court to correct its own errors, those errors which precede the rendition of the judgment. In practice the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and the latter mode has superseded the former in the British practice. *Ibid.*
3. In the circuit court for the district of Kentucky, a judgment in favour of the plaintiff in an ejectment was entered in 1798, and no proceedings on the same until 1830; when the period of the demise having expired, the court, on motion, and notice to one of the defendants, made an order inserting a demise of fifty years. It having been afterwards shown to the court that the parties really interested in the land, when the motion to amend was made, had not been noticed of the proceeding, the court issued a writ of error coram vobis, and gave a judgment sustaining the same, and that the order extending the demise should be set aside. From this judgment a writ of error was prosecuted to this court; and it was held that the judgment on the writ of error coram vobis, was not such a judgment as could be brought up by a writ of error for decision to this court. *Ibid.*

EVIDENCE.

1. Papers translated from a foreign language, respecting the transactions of foreign officers, with whose powers and authorities the court are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the court, should be carefully examined, before it pronounces that an officer holding a high place of trust and confidence, has exceeded his authority. *United States* v. *Percheman.* 51.

EVIDENCE.

2. On general principles of law, a copy of a paper given by a public officer, whose duty it is to keep the originals, ought to be received in evidence. *Ibid.*

3. What will be deemed sufficient evidence of diligent and sufficient search for a lost or mislaid original paper, to permit a copy to be read as secondary evidence. *Minor* v. *Tillotson.* 99.

4. The rules of evidence are adopted for practical purposes in the administration of justice. And although it is laid down in the books as a general rule, that the best evidence the nature of the case will admit of, must be given; yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed, is governed, in some measure, by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. *Ibid.*

5. No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying a record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but, in such a case, it must appear from the record that the evidence was used or offered to the circuit court. *Holmes et al.* v. *Trout et al.* 171.

6. Agreements had been made, under which depositions taken in other cases where the same questions of title were involved, should be read in evidence, and on the hearing in the circuit court these depositions were read: afterwards, on an appeal to this court, the decree of the circuit court was reversed, and by the decree of reversal the parties were permitted to proceed de novo. When the case was again heard in the circuit court the defendant objected to the reading of the depositions, asserting that the decree of reversal annulled the written certificate of the parties for the admission of testimony. By the court. The consent to the depositions was not limited to the first hearing, but was co-extensive with the cause. The words in the decree of reversal, that the parties may proceed de novo, are not equivalent to a dismission of the bill without prejudice; nor could the court have understood them as affecting the testimony in the cause; or setting aside the solemn agreement of the parties. The testimony is still admissible to the extent of the agreement. *Vattier* v. *Hinde.* 252.

7. A question as to the admission of evidence of the declaration of a deceased person, as to boundary. *Morris* v. *Harmer's Lessee.* 554.

8. Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works, of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not

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pre-suppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. *Ibid.*

9. The work of a living author who is within the reach of the process of the court, can hardly be deemed of this nature. He may be called as a witness; he may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials, there would seem to be cogent reasons to say that his book was not, under such circumstances, the best evidence within the reach of the parties. *Ibid.*

10. Special circumstances, which were considered as exempting the evidence contained in a book, called the "Picture of Cincinnati," of the date of the survey of the city and laying out lots in part of the same, from the common rule; which justified its admission. *Ibid.*

11. The plat of the lots in the city of Cincinnati, which had been recorded, and on which the streets and alleys in the same were designated, and which had been generally recognized and used in the surveys of the lots laid down in the same, was properly admitted in evidence. *Ibid.*

12. The depositions of several witnesses, clerks in the counting-house of the plaintiffs, were admitted on the trial of the cause, in which the witnesses stated that they knew that a letter of credit was considered by the plaintiff as covering any balance due by C. H. to them for advances from time to time, to the amount of eight thousand dollars; that advances were made, and moneys paid by them on account of C. H. from the time of receiving the said letter, predicated on the letter always protecting the plaintiffs to the amount of eight thousand dollars; and that it was considered in the counting-house as a continuing letter of credit, and so acted upon by the plaintiffs. Held, that this evidence was rightly admitted to establish that credit had been given to C. H. on the faith of it, from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion that no such advances, acceptances, or indorsements had been made upon the credit of it. The evidence was not open to the objection, that it was an attempt by parol evidence to explain a written contract. *Douglass et al.* v. *Reynolds et al.* 113.

FLORIDA TREATY.

1. Florida land claims.

2. Even in cases of conquest, it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become

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law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should be generally confiscated, and private rights annulled on a change in the sovereignty of the country, by the Florida treaty. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. *United States* v. *Percheman*. 51.

3. The language of the second article of the treaty between the United States and Spain, of 22d February 1819, by which Florida was ceded to the United States, conforms to this general principle. *Ibid.*

4. The eighth article of the treaty must be intended to stipulate expressly for the security to private property, which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security, further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old. And those titles, so far at least as they were consummated, might be asserted in the courts of the United States, independently of this article. *Ibid.*

5. The treaty was drawn up in the Spanish as well as in the English languages. Both are original, and were unquestionably intended by the parties to be identical. The Spanish has been translated; and it is now understood that the article expressed in that language is, that "the grants shall remain ratified and confirmed to the persons in possession of them, to the same extent," &c. thus conforming exactly to the universally received law of nations. *Ibid.*

6. If the English and Spanish part can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. *Ibid.*

7. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly words of contract, stipulating for some future legislation, they are not necessarily so. They may import that "they shall be ratified and confirmed" by force of the instrument itself. When it is observed that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, the construction is proper, if not unavoidable. *Ibid.*

8 In the case of Foster v. Elam, 2 Peters, 253, this court considered those words importing a contract The Spanish part of the treaty

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was not then brought into view, and it was then supposed there was no variance between them. It was not supposed that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, it is believed it would have produced the construction which is now given to the article. *Ibid.*

FLORIDA LAND CLAIMS.

1. Juan Percheman claimed two thousand acres of land lying in the territory of Florida, by virtue of a grant from the Spanish governor, made in 1815. His title consisted of a petition presented by himself to the governor of East Florida, praying for a grant of two thousand acres, at a designated place, in pursuance of the royal order of the 29th of March 1815, granting lands to the military who were in St Augustine during the invasion of 1812 and 1813; a decree by the governor, made 12th December 1815, in conformity to the petition, in absolute property, under the authority of the royal order, a certified copy of which decree and of the petition was directed to be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form; a petition to the governor, dated 31st December 1815, for an order of survey, and a certificate of a survey having been made on the 20th of August 1819 in obedience to the same. This claim was presented, according to law, to the register and receiver of East Florida, while acting as a board of commissioners to ascertain claims and titles to lands in East Florida. The claim was rejected by the board, and the following entry made of the same. "In the memorial of the claimant to this board, he speaks of a survey made by authority in 1829. If this had been produced it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim." Held: that this was not a final action on the claim in the sense those words are used in the act of the 26th of May 1830, entitled "an act supplementary to," &c. *United States* v. *Percheman.* 51.
2. Even in cases of conquest, it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become a law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should be generally confiscated, and private rights annulled on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. *Ibid.*
3. Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have

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remained the same as under the ancient sovereign. The language of the second article of the treaty between the United States and Spain, of 22d February 1819, by which Florida was ceded to the United States, conforms to this general principle. *Ibid.*

4. The eighth article of the treaty must be intended to stipulate expressly for the security to private property, which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security, further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old. And those titles, so far at least as they were consummated, might be asserted in the courts of the United States, independently of this article. *Ibid.*

5. The treaty was drawn up in the Spanish as well as the English languages. Both are original, and were unquestionably intended by the parties to be identical. The Spanish has been translated; and it is now understood that the article expressed in that language is, that "the grants shall remain ratified and confirmed to the persons in possession of them, to the same extent," &c. thus conforming exactly to the universally received law of nations. *Ibid.*

6. If the English and Spanish part can, without violence, be made to agre t construction which establishes this conformity ought to prevail. *Ibid.*

7. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly words of contract, stipulating for some future legislation, they are not necessarily so. They may import that "they shall be ratified and confirmed" by force of the instrument itself. When it is observed that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, the construction is proper, if not unavoidable. *Ibid.*

8. In the case of Foster v. Elam, 2 Peters, 253, this court considered those words importing a contract. The Spanish part of the treaty was not then brought into view, and it was then supposed there was no variance between them. It was not supposed that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, it is believed it would have produced the construction which is now given to the article. *Ibid.*

9. On the 8th of May 1822 an act was passed "for ascertaining claims and titles to land within the territory of Florida." Congress did not design to submit the validity of titles, which were "valid under the Spanish government, or by the law of nations," to the determination of the commissioners acting under this law. It was necessary to ascertain these claims, and to ascertain their location,

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not to decide finally upon them. The powers to be exercised by the commissioners ought to be limited to the object and purpose of the act. *Ibid.*

10. In all the acts passed upon this subject previous to May 1830, the decisions of the commissioners, or of the register and receiver acting as commissioners, have been confirmed. Whether these acts affirm those decisions by which claims are rejected, as well as those by which they are recommended for confirmation, admits of some doubt. Whether a rejection amounts to more than a refusal to recommend for confirmation, may be a subject of serious inquiry. However this may be, it can admit of no doubt that the decision of the commissioners was conclusive in no case until confirmed by an act of congress. The language of these acts, and among others that of the act of 1828, would indicate that the mind of congress was directed solely to the confirmation of claims, not to their annulment. The decision of this question is not necessary to this case. *Ibid.*
11. The act of 26th May 1830, entitled "an act to provide for the final settlement of land claims in Florida," contains the action of congress on the report of the commissioners of 14th January 1830, in which is the rejection of the claim of the petitioner in this case. The first, second and third sections of this act confirm the claims recommended for confirmation by the commissioners. The fourth section enacts "that all remaining claims, which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions," &c. It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress in the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed upon those which were rejected. They were, of consequence, expressly submitted to the court. *Ibid.*
12. From the testimony in the case, it does not appear that the governor of Florida, under whose grant the land is claimed by the petitioner, exceeded his authority in making the grant. *Ibid.*

FOREIGN ATTACHMENT.

Construction of the laws of Pennsylvania relative to foreign attachments. *Brashear* v. *West.* 608.

FORGERY.

1. Indictment in the circuit court of North Carolina for the forgery of, and an attempt to pass, &c. a certain paper writing in imitation of, and purporting to be a bill or note issued by the president, directors and company of the Bank of the United States, founded on the eighteenth section of the act of 1816, establishing the Bank of

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the United States. The note was signed with the name of John Huske, who had not been at any time president of the Bank of the United States, but who, at the time of the date of the counterfeit, was the president of the office of discount at Fayetteville; and was countersigned by the name of John W. Sandford, who at no time was cashier of the mother bank, but was at the said date cashier of the said office of discount and deposit. Held, that this was an offence within the provisions of the law. *United States* v. *Turner*. 132.

2. The policy of the act extends to such a case. The object is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank. It could not be presumed that persons in general could be cognizant of the fact who, at particular periods, were the president and cashier of the bank. They were officers liable to be removed at the pleasure of the directors, and the times of their appointment or removal, or even their names, could not ordinarily be within the knowledge of the body of the citizens. The public mischief would be equally great whether the names were those of the genuine officers, or of fictitious or unauthorized persons, and ordinary diligence would not protect them against imposition. *Ibid.*

3. Indictment on the eighteenth section of the act of congress, passed on the 15th day of April 1816, entitled "an act to incorporate the subscribers to the Bank of the United States." *United States* v. *Brewster*. 164.

4. The indictment charged the defendant with uttering and forging "a counterfeit bill in imitation of a bill issued by the president," &c. of the bank. The forged paper was in these words and figures: "Cashier of the Bank of the United States, Pay to C. W. Earnest, or order, five dollars. Office of Discount and Deposit in Pittsburgh, the 10th day of Dec. 1829. A. Brackenridge, Pres. J. Correy, Cash." Indorsed "Pay the bearer, C. W. Earnest." Held, that a genuine instrument, of which the forged and counterfeited instrument is an imitation, is not *a bill* issued by order of the president, &c. of the Bank of the United States, according to the true intent and meaning of the eighteenth section of the act incorporating the bank. *Ibid.*

GUARANTEE.

1. Action upon the following letter of guarantee, written by the defendants and delivered to the plaintiffs: "Our friend, Mr Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so." One count in the

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declaration was for money lent, and money had and received. Held, that upon a collateral undertaking of this sort, no such suit is maintainable. *Douglass* v. *Reynolds*. 113.

2. The depositions of several witnesses, clerks in the counting-house of the plaintiffs, were admitted on the trial of the cause, in which the witnesses stated that they knew that a letter of credit was considered by the plaintiff as covering any balance due by C. H. to them for advances from time to time, to the amount of eight thousand dollars; that advances were made, and moneys paid by them on account of C. H. from the time of receiving the said letter, predicated on the letter always protecting the plaintiffs to the amount of eight thousand dollars; and that it was considered in the counting-house as a continuing letter of credit, and so acted upon by the plaintiffs. Held, that this evidence was rightly admitted to establish that credit had been given to C. H. on the faith of it, from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion that no such advances, acceptances, or indorsements had been made upon the credit of it. The evidence was not open to the objection, that it was an attempt by parol evidence to explain a written contract. *Ibid.*

3. Nothing can be clearer, upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it; the party is not entitled to recover for any debts due by him from the debtor in whose favour it was given which have been incurred subsequently to the guarantee, and without any reference to it. *Ibid.*

4. The guarantee in this case covered successive advances, acceptances and indorsements made by the plaintiffs, to the amount of eight thousand dollars at any subsequent times, toties quoties, whenever the antecedent transactions were discharged. It was a continuing guarantee. *Ibid.*

5. Every instrument of this sort ought to receive a fair and reasonable interpretation according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction, beyond the fair import of its terms. *Ibid.*

6. The cases of Russell v. Clarke's Executors, 7 Cranch's Rep. 69, 2 Peters's Condensed Reports, 417; and Drummond v. Prestman, 12 Wheat. Rep. 515, cited. *Ibid.*

7. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed, means to give credit on the footing of it, or not. It may be most material not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in

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whose favour it is given. Especially it is important in the case of a continuing guarantee; since it may guide his judgment in recalling or suspending it. *Ibid.*

8. If this had been the case of a guarantee limited to a single transaction, it would have been the duty of the plaintiffs to have given notice of the advances, acceptances or indorsements made under it, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplate a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances, and indorsements which would be renewed and discharged from time to time; there is no general principle upon which to rest, that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions under the guarantee were closed, notice of the amount for which the guarantors were responsible, should, within a reasonable time afterwards, be communicated to them. *Ibid.*

9. A demand of payment of the sum advanced under the guarantee, should be made of the person to whom the same was made, and in case of non-payment by him, notice of such demand and non-payment should have been given in a reasonable time to the guarantors, otherwise they would be discharged from the guarantee. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a casus fœderis. The creditors are not bound to institute legal proceedings against the debtor, but they are bound to use reasonable diligence to make demand and to give notice of non-payment. *Ibid.*

10. An account was stated between the plaintiffs and Chester Haring, showing an apparent balance against Haring of twenty-two thousand five hundred and seventy-three dollars; and at the foot of the account the plaintiffs gave a receipt for several promissory notes, payable at distant periods, dated on the same day with the account. The notes were drawn by C. Haring, and indorsed by Daniel Greenleaf. The receipt stated that "the notes, when discounted, the proceeds to go to the credit of this account." The notes were discounted, and the proceeds received by the plaintiffs, but, being unpaid, they were protested; notice of their non-payment was given to the indorsers, and they were afterwards taken up by the plaintiffs as indorsers thereof. Held: if the plaintiffs below, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonour by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors. *Ibid.*

11. He who receives any note upon which third persons are respon-

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sible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. *Ibid.*

HEADS OF THE PUBLIC DEPARTMENTS OF THE GOVERNMENT.

1 The United States instituted a suit to recover a balance charged on the books of the treasury department against the defendant, who was a clerk in the navy department, upon a fixed annual salary, and acted as agent for the payment of moneys due to the navy pensioners, the privateer pensioners, and for navy disbursements; for the payment of which, funds were placed in his hands by the government. He had received an annual compensation for his services in the payment of the navy pensioners; and for fifteen years, he had received, in preceding accounts, commissions of one per cent on the moneys paid by him for navy disbursements. He claimed these commissions at the treasury, and the claim had been there rejected by the accounting officers; and if allowed the same, he was not now indebted to the government. The United States, on the trial of the case in the circuit court, denied the right of the defendant to these commissions, as they had not been allowed to him by any department of the government, and asserted that the jury had not power to allow them on the trial. *United States* v. *Macdaniel.* 1.

2. The rejection of the claim to commissions by the treasury department formed no objection to the admission of it as evidence of off-set before the jury. Had the claim never been presented to the department, it could not have been admitted as evidence by the court. But, as it had been made out in form and presented to the proper accounting officers, and had been rejected, the circuit court did right in submitting it to the jury; if the claim was considered as equitable. *Ibid.*

3. It would be a novel principle to refuse payment to the subordinates of a department, because their chief, under whose direction they had faithfully served the public, had given an erroneous construction to the law. *Ibid.*

4. The secretary of the navy, in authorizing the defendant to make the disbursements on which the claim for compensation is founded, did not transcend those powers, which, under the circumstances of the case, he might well exercise. *Ibid.*

INDICTMENT.

1. Forgery.
2. Robbing the mail.

INSOLVENT LAWS OF STATES.

Construction of the insolvent laws of Louisiana. *Breedlove et al.* v. *Nicolet et al.* 413.

JURISDICTION.

1. The plaintiffs, aliens, were residents of the state of Louisiana at the time of the execution of the note sued on in the district court of the United States for the eastern district of Louisiana, and continued to reside in New Orleans since, having a commercial house there; they are, however, absent six months in the year; but when absent have their agent to attend to their business. The defendants in the suit were residents of the city of New Orleans, and citizens of the state of Louisiana, when the note was given. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court. *Breedlove et al.* v. *Nicolet et al.* 413.

2. The plaintiff Sigg was denominated in the petition and writ "J. J. Sigg." The omission of his christian name at full length was alleged as error. By the court. He may have had no christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the name of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made—was not the partner of Theodore Nicolet & Co.; advantage should have been taken of it sooner. It is too late to allege it as error in this court. *Ibid.*

3. The petitioners aver that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they are citizens. *Ibid.*

4. If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the constitution nor the acts of congress require that aliens should reside abroad to entitle them to sue in the courts of the United States. *Ibid.*

5. The suit not having been brought against Bedford, one of the partnership, it was not necessary to aver that he was subject to the jurisdiction of the courts of the United States. *Ibid.*

6. After issue joined in the district court, the defendants filed a plea that the firm of Theodore Nicolet and Company, the plaintiffs, consisted of other persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana. The court, after receiving the plea, directed that it be taken from the files of the court. Held, that this was a proceeding in the discretion of the court; and was not assignable as error in this court. *Ibid.*

7. The commercial partnership, the drawers of the note upon which the suit was instituted, was composed of three persons, one of whom was a resident citizen of Alabama, and out of the jurisdiction of the court when the suit was brought, and the remaining two, the defendants, were resident citizens of Louisiana. Held: that although the suit, being against two of the three obligors, might not be sustained at common law; yet as the courts of Louisiana do not proceed according to the rules of the common law,

JURISDICTION.

their code being founded on the civil law, this suit properly brought. *Ibid.*

8. The note being a commercial contract, is what the law of Louisiana denominates a contract *in solido;* by which each party is bound severally as well as jointly, and may be sued severally as well as jointly. *Ibid.*

9. Juan Madrazzo, a subject of the king of Spain, filed a libel praying *admiralty* process against the state of Georgia, alleging that the state was in possession of a certain sum of money, the proceeds of the sale of certain slaves which had been seized as illegally brought into the state of Georgia; and which seizure had been subsequently, under admiralty proceedings, adjudged to have been illegal, and the right of Madrazzo to the slaves, and the money arising from the sale thereof, established by the decision of the circuit court of the United States for the district of Georgia. The counsel for the petitioner claimed that the supreme court had jurisdiction of the case, alleging that the eleventh amendment of the constitution of the United States, which declares that the judicial power of the United States shall not extend to any suits in *law* or *equity*, did not take away the jurisdiction of the courts of the United States, in suits in *the admiralty* against a state. Held, that this is not a case where property is in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person. It is a mere personal suit against a state to recover proceeds in its possession, and such a suit cannot be commenced in this court against a state. *Ex parte Juan Madrazzo.* 627.

10. Mandamus. In the district court of the northern district of New York, writs of right were prosecuted for lands lying in that district, and neither in the writs, or in the counts, was there an averment of the value of the premises being sufficient in amount to give the court jurisdiction. The tenants appeared, and moved to dismiss the cause for want of jurisdiction; which motion was granted. Subsequently, the demandant moved to reinstate the cases and to amend, by inserting an averment that the premises were of the value of five hundred dollars; which motion was denied by the court. The demandant also moved the court to compel full records of the judgments and orders of dismission, and of the process in the several suits, to be made up and filed, so that the demandant might have the benefit of a writ of error to the supreme court, in order to have its decision upon the grounds and merits of such judgments and orders. The district court refused this motion. On a rule in the supreme court for a mandamus to the district judge, and a return to the same, it was held, that the refusal to allow the amendment to the writ and count, by inserting the averment of the value of the property, was not the subject of examination in this court. The allowance of amendments to pleadings is in the discretion of the judge of the inferior court; and no control over the action of the judge in refusing or admitting them will

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be exercised by this court. The court granted a mandamus requiring the district judge to have the records of the cases made up, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court. *Ex parte Bradstreet*. 634.

11. In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States has been, to allow the value to be given in evidence. *Ibid.*

12. This court will not exercise any control over the proceedings of an inferior court of the United States, in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts; but every party in such courts has a right to the judgment of this court in a suit brought in those courts, provided the matter in dispute exceeds the value of two thousand dollars. *Ibid.*

KENTUCKY LANDS AND LAND TITLES.

1. Questions on the validity of certain entries of lands in the state of Kentucky. *Holmes et al.* v. *Trout et al.* 171.

2. A survey itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformable to the entry, and the entry can be sustained, the call for the survey may support an entry. The boundaries of the survey must be shown. This principle is fully settled by the decisions of the courts of the state of Kentucky. *Ibid.*

3. It has been a settled principle in Kentucky that surplus land does not vitiate an entry, and a survey is held valid if made conformably to such an entry. *Ibid.*

4. The principle is well settled, that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just. *Ibid.*

5. Until an entry be surveyed, a subsequent location must be governed by its calls; and this is the reason why it is essential that every entry shall describe with precision the land designed to be appropriated by it. If the land adjoining the entry should be covered by a subsequent location, it would be most unjust to sanction a survey of the prior entry beyond its calls, and so as to include a part of the junior entry. *Ibid.*

6. The locator may survey his entry in one or more surveys, or he may, at pleasure, withdraw a part of his entry. When a part of a warrant is withdrawn, the rules of the land office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn. *Ibid.*

7 In giving a construction to an entry, the intention of the locator is to be chiefly regarded, the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage, on the ground that it was made through

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mistake; but if a call be made for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for to control a rectangular figure, that form shall be given to the survey. *Ibid.*

LANDS AND LAND TITLES.

1. Florida land claims.
2. Questions on the validity of certain entries of lands in the state of Kentucky. *Holmes et al.* v. *Trout et al.* 171.
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9. Under the laws of Kentucky, the cancelling of a deed does not reinvest the title in the grantor. *Ibid.*
10. In the case of Polk's Lessee v. Wendell, 5 Wheat. 308, it is said by this court, that, on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under a void grant, can acquire nothing. *Sampeyreac et al.* v. *The United States.* 222

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11. The legal title to lands in Ohio can only be passed by a proper conveyance by deed, according to the laws of that state. *Morris* v. *Harmer's Lessee.* 554.

LEX LOCI.

A bond executed by a public officer, for the due performance of his official duties in the disbursement of public money, is to be governed by the laws of the United States as they operate in the district of Columbia, the accounts of the officer being required to be settled at the treasury department. *Duncan's Heirs* v. *The United States.* 435.

LIEN.

Admiralty.

MANDAMUS.

In the district court of the northern district of New York, writs of right were prosecuted for lands lying in that district, and neither in the writs, or in the counts, was there an averment of the value of the premises being sufficient in amount to give the court jurisdiction. The tenants appeared, and moved to dismiss the cause for want of jurisdiction; which motion was granted. Subsequently, the demandant moved to reinstate the cases and to amend, by inserting an averment that the premises were of the value of five hundred dollars; which motion was denied by the court. The demandant also moved the court to compel full records of the judgments and orders of dismission, and of the process in the several suits, to be made up and filed, so that the demandant might have the benefit of a writ of error to the supreme court, in order to have its decision upon the grounds and merits of such judgments and orders. The district court refused this motion. On a rule in the supreme court for a mandamus to the district judge, and a return to the same, it was held, that the refusal to allow the amendment to the writ and count, by inserting the averment of the value of the property, was not the subject of examination in this court. The allowance of amendments to pleadings is in the discretion of the judge of the inferior court; and no control over the action of the judge in refusing or admitting them will be exercised by this court. The court granted a mandamus requiring the district judge to have the records of the cases made up, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court. *Ex parte Bradstreet.* 634.

MARRIAGE SETTLEMENT.

1. The whole charge of the circuit court was brought up with the record. By the court. This is a practice which this court have

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uniformly discountenanced, and which the court trust a rule made at last term will effectually suppress. *Magniac* v. *Thompson*. 348.

2. This court have nothing to do with comments of the judge of the circuit court upon the evidence. The case of Carver v. Jackson, 4 Peters, 80, 81, cited upon this point. *Ibid.*
3. The question now before the court is, whether the charge to the jury in the circuit court contains any erroneous statement of the law. In examining it for the purpose of ascertaining its correctness, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. The whole is to be construed as it must have been understood, both by the court and the jury, at the time it was delivered. *Ibid.*
4. Upon principle and authority, to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a strong resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is bona fide, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. *Ibid.*
5. Fraud may be imputed to the parties, either by direct co-operation in the original design, at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design upon such notice into operation. *Ibid.*
6. Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his own wife. *Ibid.*
7. Marriage articles or settlements are not required by the laws of New Jersey to be recorded, but only conveyances of real estate: and as to conveyances of real estate, the omission to record them avoids them only as to purchasers and creditors, leaving them in full force between the parties. *Ibid.*

NAVY AGENT.

1. The act of the 27th of March 1804, by which the president of the United States was authorized to attach to the navy yard at Washington a captain of the navy for the performance of certain duties, was correctly construed by the head of the navy department until 1829, allowing to the defendant commissions on the sums paid by

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him, as the special agent of the navy department in making the disbursements. *United States* v. *Macdaniel.* 1.

2. By an act passed 10th July 1832, congress authorized the appointment of a separate and permanent navy agent at Washington, and directed the performance of the duties "not only for the navy yard in the city of Washington, but for the navy department, under the direction of the secretary of the navy, in the payment of such accounts and claims as the secretary may direct." These duties would not have been so specially stated in this act, if they had been considered by congress as coming within the ordinary duties of an agent for the navy yard at Washington, under the act of 1804. But independent of this consideration, it is enough to know that the duties in question were discharged by the defendant, under the construction given to the law by the secretary of the navy. *Ibid.*

3. Heads of the public departments of the government.

4. Public accounts.

PARTNERSHIP.

There is no doubt that the liability of a deceased co-partner, as well as his interest in the profits of a concern, may, by contract, be extended beyond his death; but without such a stipulation, even in the case of a co-partnership for a term of years, it is clear that death dissolves the concern. *Scholefield* v. *Eichelberger.* 586.

PARDON.

1. The defendant was indicted for robbing the mail of the United States, and putting the life of the driver in jeopardy, and the conviction and judgment pronounced upon it extended to both offences. After this judgment no prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded. *United States* v. *Wilson.* 150.

2. The power of pardon in criminal cases had been exercised from time immemorial by the executive of that nation whose language is our language; and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon; and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. *Ibid.*

3. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed

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not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and would overturn those rules which have been settled by the wisdom of ages. *Ibid.*

4. There is nothing peculiar in a pardon which ought to distinguish it in this respect from other facts: no legal principle known to the court will sustain such a distinction. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. *Ibid.*

5. It may be supposed that no being condemned to death would reject a pardon, but the rule must be the same in capital cases and in misdemeanours. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment. *Ibid.*

6. The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court, by plea, motion or otherwise." *Ibid.*

7. The reason why a court must, ex officio, take notice of a pardon by act of parliament, is, that it is considered as a public law, having the same effect on the case as if the general law punishing the offence had been repealed or annulled. *Ibid.*

PATENTS FOR NEW AND USEFUL INVENTIONS.

1. Action for an alleged violation of a patent for an improvement in guns and fire arms. *Shaw* v. *Cooper.* 292.

2. The letters patent were obtained in 1822; and in 1829, the patentee having surrendered the same for an alleged defect in the specification, obtained another patent. This second patent is to be considered as having relation to the emanation of the patent of 1822; and not as having been issued on an original application. *Ibid.*

3. The holder of a defective patent may surrender it to the department of state, and obtain a new one, which shall have relation to the emanation of the first. *Ibid.*

4. The case of Grant and others v. Raymond, 6 Peters, 220, cited and affirmed. *Ibid.*

5. A second patent granted on the surrender of a prior one being a continuation of the first, the rights of a patentee must be ascertained by the law under which the original application was made. *Ibid.*

PATENTS FOR NEW AND USEFUL INVENTIONS.

6. By the provisions of the act of congress of 17th April 1800, citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases, the right must be tested by the same rule. *Ibid.*

7. What use by the public, before the application is made for a patent, shall make void the right of a patentee. *Ibid.*

8. From an examination of the various provisions of the acts of congress relative to patents for useful inventions, it clearly appears that it was the intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only; and that, on condition that his invention was neither known nor used by the public, before his application for a patent. If such use or knowledge shall be proved to have existed prior to the application for the patent, the act of 1793 declares the patent void; and the right of an alien is vacated in the same manner, by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien. *Ibid.*

9. The knowledge or use spoken of in the act of congress of 1793, could have referred to the public only; for the provision would be nugatory if it were applied to the inventor himself. He must necessarily have a perfect knowledge of the thing invented, and of its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. *Ibid.*

10. There may be cases in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances, no presumption can arise in favour of an abandonment of the right to the public by the inventor: though an acquiescence on his part will lay the foundation for such a presumption. It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery, for the period contemplated by law. But those can only be reserved by a substantial compliance with every legal requisite. This exclusive right does not rest alone on his discovery, but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed. *Ibid.*

11. No matter by what means an invention may have been communicated to the public before a patent is obtained, any acquiescence in the public use by the inventor will be an abandonment of the right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. *Ibid.*

12. The acquiescence of an inventor in the public use of his invention,

PATENTS FOR NEW AND USEFUL INVENTIONS.

can in no case be presumed where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will in general be a fact for a jury: and if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as for ever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public. *Ibid.*

13. A strict construction of the act of congress, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy. *Ibid.*

14. The question of abandonment to the public, does not depend on the intention of the inventor. Whatever may be the intention, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right. *Ibid.*

PLEAS AND PLEADING.

Practice.

PRACTICE.

1. A case not being properly prepared in the circuit court for a hearing, the decree was reversed, and the cause remanded, with liberty to the plaintiff to amend his bill. *Estho et al.* v. *Lear.* 130.

2. A decree was pronounced by the district court of the United States for the district of Alexandria, in December 1829, from which the defendants appealed, but did not bring up the record. At January term 1832, the appellees, in pursuance of the rule of court, brought up the record and filed it; and, on motion of their counsel, the appeal was dismissed. On the 9th of March 1832, a citation was signed by the chief justice of the court for the district of Columbia, citing the plaintiffs in the original action to appear before the supreme court, *then in session*, and show cause why the decree of the circuit court should not be corrected. A copy of the record was returned with the citation, "executed" and filed with the clerk. By the court. The record is brought up irregularly, and the cause must be dismissed. *Yeaton et al.* v. *Lenox et al.* 220.

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bound to presume that the defalcation occurred within the district; and if the paymaster acted beyond the limits of the district, it was incumbent on the defendants to prove the fact: held, that there was no error in these decisions of the district court of Louisiana. *Duncan's Heirs* v. *The United States*. 435.

11. This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed; and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington; and to the treasury, did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the federal government cannot be questioned. It has the power of prescribing under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government; and, in contemplation of law, at the place where its principal powers are exercised. *Ibid.*

12. It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court. In this case it appears that the Louisiana law, which regulated the practice of the district court of Louisiana, has not only been repealed, but the record shows that in the year 1830, when the decision was given in this case, there was no such practice of the court, as was adopted by the act of congress of 26th May 1824. The court refused the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court." By the court. On a question of practice, it would seem that the decision of the district court as to what the practice is should be conclusive. The practice of the court cannot be better known and established than by its own solemn adjudications on the subject. *Ibid.*

13. On the 12th of February 1807, an attachment was regularly issued by the court of Williamson county, Tennessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit. Judgment by default was entered on the 15th of October 1807; the property was on motion condemned, and a writ of venditioni exponas issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it, on the 2d of January 1808. The county of Williamson was divided on the 16th of November 1807, and that part of the land for which this ejectment was brought, lay in the new county called Maury. Held, that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property, which was already in his possession, by virtue of the attachment, and was already condemned by the competent tribunal. The subsequent

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division of the county could not divest his vested interest, or deprive the officer of the power to finish a process which was already begun. *Tyrell's Heirs* v. *Rountree et al.* 464.

14. The instructions given to the jury, not conforming to the issue made up by the pleadings, a venire de novo was awarded. *Scott* v. *Lunt's Administrator*. 596.

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16. In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States has been, to allow the value to be given in evidence. *Ex parte Bradstreet*. 634.

17. This court will not exercise any control over the proceedings of an inferior court of the United States, in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts; but every party in such courts has a right to the judgment of this court in a suit brought in those courts, provided the matter in dispute exceeds the value of two thousand dollars. *Ibid.*

PRINCIPAL AND SURETY.

Guarantee.

PROCESS.

The form of process in the case of The State of Rhode Island v. The State of Massachusetts. *Rhode Island* v. *Massachusetts*. 651.

PROMISSORY NOTE.

1. Whether certain facts in reference to an alleged notice to the indorser, and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law, for the consideration of the jury. *Union Bank* v. *Magruder*. 287.

2. Usury.

PUBLIC AGENTS AND OFFICERS.

1. The United States brought an action against General Ripley for a certain amount of public money he had, as was alleged, failed to account for and pay over as the law required. The defendant was in the service of the United States from 1812 to 1817; and was promoted at different periods, until he resigned his commission as major-general by brevet in the latter year. During this period he rendered distinguished and active military services to his country, and received the pay and emoluments to which his rank entitled him, under the law and regulations applicable thereto. Large sums of moneys passed through his hands, and were disbursed by him for the supplies of the troops under his command. He claimed a commission on these sums, and offered evidence to prove that similar allowances had been made to others. He also claimed extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans of fortifications, and for procuring and forwarding supplies of provisions, &c. to troops of the United States, beyond his military command. These claims were resisted by the United States on the ground that no other compensation could be allowed to him than such as was mentioned or defined by the laws of the United States, by instructions of the president, or by the legal regulations of the war department. *United States* v. *Ripley*. 18.

2. It is presumed that every person who has been engaged in the public service has received the compensation allowed by law, until the contrary appear. The amount of compensation in the military service may depend, in some degree, on the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances. *Ibid.*

3. If the disbursements, for which compensation is claimed, were not such as were ordinarily attached to the duties of the officer, the fact should be stated; and also that the service was performed under the sanction of the government, or under such circumstances as rendered the extra labour and responsibility assumed in performing it necessary. *Ibid.*

4. Should the accounting officer of the treasury refuse to allow an officer the established compensation which belongs to his station, the claim, having been rejected by the proper department, should, unquestionably, be allowed by way of set-off to the demand of the government by a court and jury. *Ibid.*

5. And it is equally clear, that an equitable allowance should be made in the same manner for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of peculiar emergency. In such a case the compensation should be graduated by the amount paid for like services under similar circumstances. Usage may be safely relied upon in such cases, as fixing a just compensation. *Ibid.*

6 However valuable the plans for fortifications, prepared by a public

PUBLIC AGENTS AND OFFICERS.

officer, may have been, unless they were prepared at the request of the government, or were indispensable to the public service, as a matter of right, a compensation for them cannot be claimed. *Ibid.*

7. The claims of compensation set up by a public officer, must be brought within the established rules on the subject, before they can receive judicial sanction. *Ibid.*

8. The United States instituted an action to recover a balance, certified at the treasury, against the defendant on the settlement of his accounts as secretary to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board. These claims were rejected by the accounting officers of the treasury, and were on the trial set up by way of set-off against the demand on the part of the United States. Held: that the allowance of compensation by a fixed salary to the defendant, as the secretary of the board of the navy hospital commissioners, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund. Held: that it was not necessary to entitle the defendant to such compensation, that the board of commissioners should have passed a resolution for the payment of such commissions, and that the claim of commissions should have been sanctioned and settled by the board, in order to enable the defendant to set up a claim against the United States. *United States* v. *Fillebrown*. 28.

9. The authority of the commissioners to appoint a secretary was not denied; and this same authority must necessarily exist, to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them. *Ibid.*

10. From the testimony in the case, it is very certain that the secretary of the navy considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation. And it is fairly to be collected from his deposition that all this received the direct sanction of all the commissioners. But whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law. It was therefore an express contract entered into between the board or its agent, and the defendant; and it was not in the power of the board, composed even of the same men after the service had been performed, to rescind the contract, and withhold from

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the defendant the stipulated compensation. There is no doubt, the board, composed of other members, had the same power over this matter as the former board; but it cannot be admitted that it had any greater power. The rejection therefore of these claims, on the 7th of September 1829, after all the services had been performed by the defendant, can have no influence upon the question. *Ibid.*

11. There is no general principle of law known to the court, and no authority has been shown establishing the doctrine that all the proceedings of such boards must be in writing, or that they shall be deemed void; unless the statute under which they act shall require their proceedings to be reduced to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing; but the law imposes no such indispensable duty. The act of 1811, 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury and war departments, a board of commissioners, by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed: but the mode and manner of transacting their business is not in any way prescribed. *Ibid.*

12. It is not true even with respect to corporations, that all their acts must be established by positive record evidence. In the case of the Bank of the United States v. Dandridge, 12 Wheat. 69, this court say, "we do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it, makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction, it must be obeyed. If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same. This principle is fully established in the case of the United States v. Wilkins, 6 Wheat. 143: which brought under the consideration of the court, the act of the 3d of March 1797, 2 Laws U. S. 594, providing for the settlement of accounts between the United States and public receivers. *Ibid.*

13. The instructions given to the jury by the circuit court were: if the jury believe from the evidence, that the regular duties to be performed by the defendant, as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund: that the duty of receiving and disbursing the fund was required of and performed by him, as an extra service, over and above the regular duties of his said appointment: that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive stated

PARDON.

not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and would overturn those rules which have been settled by the wisdom of ages. *Ibid.*

4. There is nothing peculiar in a pardon which ought to distinguish it in this respect from other facts: no legal principle known to the court will sustain such a distinction. A pardon is a deed, to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him. *Ibid.*
5. It may be supposed that no being condemned to death would reject a pardon, but the rule must be the same in capital cases and in misdemeanours. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment. *Ibid.*
6. The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court, by plea, motion or otherwise." *Ibid.*
7. The reason why a court must, ex officio, take notice of a pardon by act of parliament, is, that it is considered as a public law, having the same effect on the case as if the general law punishing the offence had been repealed or annulled. *Ibid.*

PATENTS FOR NEW AND USEFUL INVENTIONS.

1. Action for an alleged violation of a patent for an improvement in guns and fire arms. *Shaw* v. *Cooper*. 292.
2. The letters patent were obtained in 1822; and in 1829, the patentee having surrendered the same for an alleged defect in the specification, obtained another patent. This second patent is to be considered as having relation to the emanation of the patent of 1822; and not as having been issued on an original application. *Ibid.*
3. The holder of a defective patent may surrender it to the department of state, and obtain a new one, which shall have relation to the emanation of the first. *Ibid.*
4. The case of Grant and others v. Raymond, 6 Peters, 220, cited and affirmed. *Ibid.*
5. A second patent granted on the surrender of a prior one being a continuation of the first, the rights of a patentee must be ascertained by the law under which the original application was made. *Ibid.*

PATENTS FOR NEW AND USEFUL INVENTIONS.

6. By the provisions of the act of congress of 17th April 1800, citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases, the right must be tested by the same rule. *Ibid.*

7. What use by the public, before the application is made for a patent, shall make void the right of a patentee. *Ibid.*

8. From an examination of the various provisions of the acts of congress relative to patents for useful inventions, it clearly appears that it was the intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only; and that, on condition that his invention was neither known nor used by the public, before his application for a patent. If such use or knowledge shall be proved to have existed prior to the application for the patent, the act of 1793 declares the patent void; and the right of an alien is vacated in the same manner, by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien. *Ibid.*

9. The knowledge or use spoken of in the act of congress of 1793, could have referred to the public only; for the provision would be nugatory if it were applied to the inventor himself. He must necessarily have a perfect knowledge of the thing invented, and of its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. *Ibid.*

10. There may be cases in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances, no presumption can arise in favour of an abandonment of the right to the public by the inventor: though an acquiescence on his part will lay the foundation for such a presumption. It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery, for the period contemplated by law. But those can only be reserved by a substantial compliance with every legal requisite. This exclusive right does not rest alone on his discovery, but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed. *Ibid.*

11. No matter by what means an invention may have been communicated to the public before a patent is obtained, any acquiescence in the public use by the inventor will be an abandonment of the right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. *Ibid.*

12. The acquiescence of an inventor in the public use of his invention,

PATENTS FOR NEW AND USEFUL INVENTIONS.

can in no case be presumed where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will in general be a fact for a jury: and if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as for ever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public. *Ibid.*

13. A strict construction of the act of congress, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy. *Ibid.*
14. The question of abandonment to the public, does not depend on the intention of the inventor. Whatever may be the intention, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right. *Ibid.*

PLEAS AND PLEADING.

Practice.

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10. Action on a bond executed by William Carson, as paymaster, and signed by A. L. Duncan and John Carson as his sureties, conditioned that William Carson, paymaster for the United States, should perform the duties of that office within the district of Orleans. The breach alleged was that W. C. had received large sums of money in his official capacity, in his life time, which he had refused to pay into the treasury of the United States. The bond was drawn in the names of Abner L. Duncan, John Carson and Thomas Duncan as sureties for William Carson, but was not executed by Thomas Duncan. There were no witnesses to the bond, but it was acknowledged by all the parties to it before a notary public. The defendants, the heirs and representatives of A. L. Duncan, in answer to a petition to compel the payment of the bond, say that it was stipulated and understood, when the bond was executed, that one Thomas Duncan should sign it, which was never done, and the bond was never completed; and therefore A. L. Duncan was never bound by it: they also say, that, as the representatives of A. L. Duncan, they are not liable for the alleged defalcation of William Carson, because he acted as paymaster out of the limits of the district of Louisiana; and the deficiencies, if any, occurred without the limits of the said district. Before the jury were sworn the defendants offered a statement to the court for the purpose of obtaining a special verdict on the facts, according to the provisions of the act of the legislature of Louisiana of 1818. The court would not suffer the same to be given to the jury for a special finding, because it "was contrary to the practice of the court to compel a jury to find a special verdict." The judge charged the jury that the bond sued upon was not to be governed by the laws of Louisiana in force when the bond was signed at New Orleans, but that this and all similar bonds must be considered as having been executed at the seat of the government of the United States, and to be governed by the principles of the common law; that although the copy of the bond sued on, which was certified from the treasury department, exhibited a scrawl instead of a seal, yet they had a right to presume that the original bond had been executed according to law; and that in the absence of all proof as to the limits of the district of New Orleans, the jury wa

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bound to presume that the defalcation occurred within the district; and if the paymaster acted beyond the limits of the district, it was incumbent on the defendants to prove the fact: held, that there was no error in these decisions of the district court of Louisiana. *Duncan's Heirs* v. *The United States*. 435.

11. This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed; and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington; and to the treasury, did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the federal government cannot be questioned. It has the power of prescribing under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases the local law cannot affect the contract, as it is made with the government; and, in contemplation of law, at the place where its principal powers are exercised. *Ibid.*

12. It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court. In this case it appears that the Louisiana law, which regulated the practice of the district court of Louisiana, has not only been repealed, but the record shows that in the year 1830, when the decision was given in this case, there was no such practice of the court, as was adopted by the act of congress of 26th May 1824. The court refused the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court." By the court. On a question of practice, it would seem that the decision of the district court as to what the practice is should be conclusive. The practice of the court cannot be better known and established than by its own solemn adjudications on the subject. *Ibid.*

13. On the 12th of February 1807, an attachment was regularly issued by the court of Williamson county, Tennessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit. Judgment by default was entered on the 15th of October 1807; the property was on motion condemned, and a writ of venditioni exponas issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it, on the 2d of January 1808. The county of Williamson was divided on the 16th of November 1807, and that part of the land for which this ejectment was brought, lay in the new county called Maury. Held, that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property, which was already in his possession, by virtue of the attachment, and was already condemned by the competent tribunal. The subsequent

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division of the county could not divest his vested interest, or deprive the officer of the power to finish a process which was already begun. *Tyrell's Heirs* v. *Rountree et al.* 464.

14. The instructions given to the jury, not conforming to the issue made up by the pleadings, a venire de novo was awarded. *Scott* v. *Lunt's Administrator.* 596.

15. It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court. In this case it appears that the Louisiana law, which regulated the practice of the district court of Louisiana, has not only been repealed, but the record shows that in the year 1830, when the decision was given in this case, there was no such practice of the court, as was adopted by the act of congress of 26th May 1824. The court refused the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court." By the court. On a question of practice, it would seem that the decision of the district court as to what the practice is should be conclusive. The practice of the court cannot be better known and established than by its own solemn adjudications on the subject. *Duncan's Heirs* v. *The United States.* 435.

16. In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States has been, to allow the value to be given in evidence. *Ex parte Bradstreet.* 634.

17. This court will not exercise any control over the proceedings of an inferior court of the United States, in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts; but every party in such courts has a right to the judgment of this court in a suit brought in those courts, provided the matter in dispute exceeds the value of two thousand dollars. *Ibid.*

PRINCIPAL AND SURETY.

Guarantee.

PROCESS.

The form of process in the case of The State of Rhode Island v. The State of Massachusetts. *Rhode Island* v. *Massachusetts.* 651.

PROMISSORY NOTE.

1. Whether certain facts in reference to an alleged notice to the indorser, and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law, for the consideration of the jury. *Union Bank* v. *Magruder.* 287.

2. Usury.

PUBLIC AGENTS AND OFFICERS.

1. The United States brought an action against General Ripley for a certain amount of public money he had, as was alleged, failed to account for and pay over as the law required. The defendant was in the service of the United States from 1812 to 1817; and was promoted at different periods, until he resigned his commission as major-general by brevet in the latter year. During this period he rendered distinguished and active military services to his country, and received the pay and emoluments to which his rank entitled him, under the law and regulations applicable thereto. Large sums of moneys passed through his hands, and were disbursed by him for the supplies of the troops under his command. He claimed a commission on these sums, and offered evidence to prove that similar allowances had been made to others. He also claimed extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans of fortifications, and for procuring and forwarding supplies of provisions, &c. to troops of the United States, beyond his military command. These claims were resisted by the United States on the ground that no other compensation could be allowed to him than such as was mentioned or defined by the laws of the United States, by instructions of the president, or by the legal regulations of the war department. *United States* v. *Ripley*. 18.

2. It is presumed that every person who has been engaged in the public service has received the compensation allowed by law, until the contrary appear. The amount of compensation in the military service may depend, in some degree, on the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances. *Ibid.*

3. If the disbursements, for which compensation is claimed, were not such as were ordinarily attached to the duties of the officer, the fact should be stated; and also that the service was performed under the sanction of the government, or under such circumstances as rendered the extra labour and responsibility assumed in performing it necessary. *Ibid.*

4. Should the accounting officer of the treasury refuse to allow an officer the established compensation which belongs to his station, the claim, having been rejected by the proper department, should, unquestionably, be allowed by way of set-off to the demand of the government by a court and jury. *Ibid.*

5. And it is equally clear, that an equitable allowance should be made in the same manner for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of peculiar emergency. In such a case the compensation should be graduated by the amount paid for like services under similar circumstances. Usage may be safely relied upon in such cases, as fixing a just compensation. *Ibid.*

6 However valuable the plans for fortifications, prepared by a public

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officer, may have been, unless they were prepared at the request of the government, or were indispensable to the public service, as a matter of right, a compensation for them cannot be claimed. *Ibid.*

7. The claims of compensation set up by a public officer, must be brought within the established rules on the subject, before they can receive judicial sanction. *Ibid.*

8. The United States instituted an action to recover a balance, certified at the treasury, against the defendant on the settlement of his accounts as secretary to the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board, antecedent to his appointment as secretary; and also for commissions on the disbursement of moneys under the orders of the board. These claims were rejected by the accounting officers of the treasury, and were on the trial set up by way of set-off against the demand on the part of the United States. Held: that the allowance of compensation by a fixed salary to the defendant, as the secretary of the board of the navy hospital commissioners, did not exclude his right to claim extra compensation for the disbursement of moneys belonging to the navy hospital fund. Held: that it was not necessary to entitle the defendant to such compensation, that the board of commissioners should have passed a resolution for the payment of such commissions, and that the claim of commissions should have been sanctioned and settled by the board, in order to enable the defendant to set up a claim against the United States. *United States* v. *Fillebrown*. 28.

9. The authority of the commissioners to appoint a secretary was not denied; and this same authority must necessarily exist, to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them. *Ibid.*

10. From the testimony in the case, it is very certain that the secretary of the navy considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation. And it is fairly to be collected from his deposition that all this received the direct sanction of all the commissioners. But whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law. It was therefore an express contract entered into between the board or its agent, and the defendant; and it was not in the power of the board, composed even of the same men after the service had been performed, to rescind the contract, and withhold from

the defendant the stipulated compensation. There is no doubt, the board, composed of other members, had the same power over this matter as the former board; but it cannot be admitted that it had any greater power. The rejection therefore of these claims, on the 7th of September 1829, after all the services had been performed by the defendant, can have no influence upon the question. *Ibid.*

11. There is no general principle of law known to the court, and no authority has been shown establishing the doctrine that all the proceedings of such boards must be in writing, or that they shall be deemed void; unless the statute under which they act shall require their proceedings to be reduced to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing; but the law imposes no such indispensable duty. The act of 1811, 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury and war departments, a board of commissioners, by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed: but the mode and manner of transacting their business is not in any way prescribed. *Ibid.*

12. It is not true even with respect to corporations, that all their acts must be established by positive record evidence. In the case of the Bank of the United States v. Dandridge, 12 Wheat. 69, this court say, "we do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it, makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction, it must be obeyed. If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same. This principle is fully established in the case of the United States v. Wilkins, 6 Wheat. 143: which brought under the consideration of the court, the act of the 3d of March 1797, 2 Laws U. S. 594, providing for the settlement of accounts between the United States and public receivers. *Ibid.*

13. The instructions given to the jury by the circuit court were: if the jury believe from the evidence, that the regular duties to be performed by the defendant, as secretary to the commissioners of the navy hospital fund, at the stated salary of two hundred and fifty dollars per annum, did not extend to the receipt and disbursement of the fund: that the duty of receiving and disbursing the fund was required of and performed by him, as an extra service, over and above the regular duties of his said appointment: that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive stated

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salaries or other fixed compensation, commissions, over and above such salaries or other compensation, upon the receipts and disbursements of public moneys, appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labour and responsibility, apart from such ordinary and regular duties: and that the defendant took upon himself the labour and responsibility of such receipts and expenditures of the navy hospital fund, at the request of said commissioners, or with an understanding on both sides, that he should be compensated for the same, as extra service, by the allowance of a commission on the amount of such receipts and expenditures: then it is competent for the jury in this case, to allow such commission to the defendant, on the said receipts and disbursements, as the jury may find to have been agreed upon between the said commissioners and the defendant: or, in the absence of any specific agreement, fixing the rate of commissions at such rate as the jury shall find to be reasonable and conformable to the general usage of the government, and its departments, in the like cases. These instructions were entirely correct, and in conformity to the rules and principles of the law on this subject. *Ibid.*

14. Upon the trial of this cause, the defendant offered to prove, by parol testimony, the general usage of the different departments of the government, in allowing commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage, but the court permitted the evidence to be given. By the court: we see no grounds for objection against the usage offered to be proved, and the purpose for which it was so offered, as connected with the very terms upon which the defendant was employed to perform the services. It was not for the purpose of establishing the right, but to show the measure of compensation, and the manner in which it was to be paid. *Ibid.*

PUBLIC ACCOUNTS.

1. Public agents and officers.
2. Set-off.
3. Lex loci.

ROBBING THE MAIL.

1. The defendant was indicted upon the twenty-fourth section of the act of congress of 3d March 1825, entitled "an act to reduce into one the several acts establishing and regulating the post office department," for advising, procuring and assisting one Joseph I. Straughan, a mail carrier, to rob the mail; and was found guilty. Upon this finding, the judges of the circuit court of North Carolina

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were divided in opinion on the question, whether an indictment founded on the statute for advising, &c. a mail carrier to rob the mail, ought to set forth or aver that the said carrier did in fact commit the offence of robbing the mail? By the court. The answer to this, as an abstract proposition, must be in the affirmative. But if the question intended to be put is, whether there must be a distinct substantive averment of that fact: it is not necessary. The indictment in this case sufficiently sets out that the offence had been committed by the mail carrier. *United States* v. *Mills.* 138.

2. The offence charged in this indictment is a misdemeanour where all are principals; and the doctrine applicable to the principal and accessary in cases of felony, does not apply. The offence, however, charged against the defendant is secondary in its character; and there can be no doubt that it must sufficiently appear upon the indictment, that the offence alleged against the chief actor had been committed. *Ibid.*

RULES OF COURT.

1. Rule as to printed arguments. iv.
2. Rule as to the use of the library of the court. iv.

SET-OFF.

1. The United States instituted a suit to recover a balance charged on the books of the treasury department against the defendant, who was a clerk in the navy department, upon a fixed annual salary, and acted as agent for the payment of moneys due to the navy pensioners, the privateer pensioners, and for navy disbursements; for the payment of which, funds were placed in his hands by the government. He had received an annual compensation for his services in the payment of the navy pensioners; and for fifteen years, he had received, in preceding accounts, commissions of one per cent on the moneys paid by him for navy disbursements. He claimed these commissions at the treasury, and the claim had been there rejected by the accounting officers; and if allowed the same, he was not now indebted to the government. The United States, on the trial of the case in the circuit court, denied the right of the defendant to these commissions, as they had not been allowed to him by any department of the government, and asserted that the jury had not power to allow them on the trial. Held, that the rejection of the claim to commissions by the treasury department formed no objection to the admission of it as evidence of offset before the jury. Had the claim never been presented to the department, it could not have been admitted as evidence by the court. But, as it had been made out in form and presented to the proper accounting officers, and had been rejected, the circuit court did right in submitting it to the jury; if the claim was considered as equitable. *United States* v. *Macdaniel.* 1.

SET-OFF.

2. This court will not sanction a limitation of the power of the circuit court, in cases of this kind, to the admission of evidence to the jury on a trial, only to such items of offset against the claims of the government as were strictly legal, and which the accounting officer of the treasury should have allowed. It is admitted that a claim which requires legislative sanction, is not a proper offset either before the treasury officers or the court. But there may be cases in which the services having been rendered, a compensation may be made within the discretion of the head of the department; and in such cases the court and jury will do, not what an auditor was authorized to do, but what the head of the department should have done, in sanctioning an equitable allowance. *Ibid.*

3. An action of assumpsit was brought by the government to recover from the defendant the exact sum which in equity it was admitted he was entitled to receive for valuable services rendered to the public in a subordinate capacity, under the express sanction of the head of the navy department. This sum of money happened to be in the hands of the defendant; and the question was, whether he shall, under the circumstances, be required to surrender it to the government, and then petition congress on the subject. A simple statement of the case would seem to render proper a very different course. *Ibid.*

TRADING WITH THE ENEMY.

1. Action of assumpsit to recover the balance of an account current for merchandize purchased in England by order of the defendants. The defence was, that the contract was made during the war, and therefore void. By the court. The doctrine is not to be questioned at this day, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other. *Scholefield* v. *Eichelberger*. 586.

2. To say that this rule is without exception, would be assuming too great latitude. The question has never yet been examined whether a contract for necessaries, or even for money to enable the individual to get home, could not be enforced; and analogies familiar to the law, as well as the influence of the general rule, in international law, that the severities of war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But at present, it may be safely affirmed that there is no recognized exception, but permission of a state to its own citizens, which is also implied in any treaty stipulation to that effect, entered into with a belligerent. *Ibid*

TREATY

Florida land claims.

USAGE.

1. Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions. *United States* v. *Macdaniel*. 1.
2. Upon the trial of this cause, the defendant offered to prove, by parol testimony, the general usage of the different departments of the government, in allowing commissions to the officers of government upon disbursements of money under a special authority not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage, but the court permitted the evidence to be given. By the court. We see no grounds for objection against the usage offered to be proved, and the purpose for which it was so offered, as connected with the very terms upon which the defendant was employed to perform the services. It was not for the purpose of establishing the right, but to show the measure of compensation, and the manner in which it was to be paid. *United States* v. *Fillebrown*. 28.

USURY.

1. A promissory note, payable at a future day, given for a bona fide business transaction, and which note was not made for the purpose of raising money in the market, was sold by the drawee and indorser for a sum so much less on its face, as exhibited a discount beyond the legal rate of interest, no stipulation having been made against the liability of the indorser; is not per se an usurious contract between the indorser and indorsee, and an action can be maintained upon the note against the indorser who sold the same, by the purchaser. *Nichols* v. *Fearson*. 103.
2. The courts of New York have adjudicated, that whenever the note or bill in its inception was a real transaction, so that the payee or promissee might at maturity maintain a suit upon it, a transfer by indorsement, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal negotiation. *Ibid.*
3. There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred: the first is, that, to constitute usury, there must be a loan in contemplation by the parties; and the second, that a contract which in its inception is unaffected by usury, can never be invalidated by any subsequent usurious transaction. *Ibid.*

VIRGINIA.

The common law of England, and all the statutes of parliament made in aid of the common law, prior to the fourth year of the reign of king James the first, which are of a general nature, and not local

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to the kingdom, were expressly adopted by the Virginia statute of 1776; and the subsequent revisions of its code have confirmed the general doctrine on this particular subject *Scott* v. *Lunt's Administrator*. 596

WRIT OF ERROR

Error.

THE END